BEFORE THE ARIZONA CORPORATION COM

COMMISSIONERS

DOUG LITTLE, Chairman
BOB STUMP
ROBERT BURNS
TOM FORESE
ANDY TOBIN

IN THE MATTER OF THE FORMAL COMPLAINT OF SWING FIRST GOLF LLC AGAINST JOHNSON UTILITIES LLC

DOCKET NO. WS-02987A-16-0017

SWING FIRST'S BRIEF OPPOSING MOTION TO DISMISS

As requested on April 6, 2016, by Judge Kinsey, Swing First Golf, LLC ("Swing First") hereby submits this brief concerning the Motion to Dismiss filed by Johnson Utilities, LLC ("Utility").

I Introduction

As will be discussed further below:

- Utility submitted to the Commission's jurisdiction over effluent sales and service when it applied for and received a Certificate of Convenience and Necessity from the Commission in 1997 to provide water and wastewater service to the Johnson Ranch development —including effluent service to the Johnson Ranch golf course. The Commission granted Utility a monopoly to provide these services, subject to "vigilant and continuous regulation by the Corporation Commission" … . *Davis v. Corporation Comm'n*, 96 Ariz. 215, 218; 393 P.2d 909, 911 (1964).
- Even if Utility did not have a CC&N, the Arizona Constitution would provide the Commission jurisdiction over Utility's effluent sales for irrigation.
- Swing First and Utility have at least three contracts requiring Utility to sell effluent to Swing First. *First*, there is the 1999 Agreement Regarding Utility Service ("Utility Service Agreement"), the terms of which Utility agreed would apply to Swing First.

Second, there is Utility's Commission approved effluent Tariff, which the Court of Appeals found to be a binding contract between Swing First and Utility.

> Utility does not dispute the existence of a contract – it provided irrigation water to SFG for a fee. ... Because the water rates that Utility can charge its customers for CAP water and effluent are set by the ACC, the approved tariffs constitute an enforceable contract between Utility and its customer, SFG. *Johnson Utils., LLC v. Swing First Golf, LLC*, 2015 Ariz. App. LEXIS 167 (Ariz. Ct. App. Aug. 27, 2015) (Copy attached as **Exhibit A**).

Third, Utility offered and Swing First accepted the January 12, 2016, Class A+ Reclaimed Water Agreement, which specifies Swing First's right to receive approximately 390 acre-feet per year pursuant to Utility's Commission authorized tariff rates as supplement by an oral side agreement.

- Utility blatantly misrepresented to the Commission its future intentions concerning effluent sales. At the April 6, 2016, Procedural Conference, Utility told the Commission that it would be discontinuing effluent sales to all effluent customers and would be recharging all effluent to receive water credits. These representations were false. Utility retracted its promises through an April 19, 2016, letter to the docket (Copy attached as **Exhibit B**) from Brad Cole, Utility's Chief Operating Officer.[1] Mr. Cole stated that Utility intended, *with the exception of Swing First* to continue effluent sales to all existing customers, including Utility's own Oasis Golf Course.[2]
- Utility falsely claims that it will benefit customers by generating additional re-use credits by discontinuing effluent sales to Swing First. This is misleading. In fact, Utility only would benefit Utility by driving a competitor out of business. Every credit generated through recharge would be offset by extracting an equivalent amount of groundwater, plus Utility would incur additional electricity costs to pump the groundwater. There would be no net benefit to customers.

[1] The letter is dated February 19, 2016, but this is obviously an error. The letter was docketed on April 19, 2016, and discusses the April 6, 2016, Procedural Conference in this Docket.
[2] The letter did not discuss sales to the San Tan Heights Homeowner's Association.

- To provide complete relief, the Commission has the power to award attorney's fees to a successful complainant under A.R.S. §§ 40-246.

For these reasons, as more fully set forth below, Utility's motion should be denied and the Commission should hear Swing First's Complaint.

II The Commission has jurisdiction to hear Swing First's Complaint

A Utility's CC&N provides the Commission comprehensive jurisdiction

By asking the Commission for and receiving a CC&N to provide water and wastewater services, Utility submitted itself to Commission jurisdiction concerning all these services. In Opinion and Order No. 60223, dated May 27, 1997, the Commission authorized Utility to provide water and wastewater services and gave Utility a monopoly on all these services, including Utility's requested deliveries of effluent at a specified rate.

The Commission's CC&N grant was consistent with Arizona's monopoly theory of regulation. "[T]he issuance of certificates of convenience and necessity under the statutory system adopted in Arizona gave the certificate holder a monopoly (regulated by the Commission as to rates, etc.) to supply the service within the certificated area." *James P. Paul Water Co. v. Arizona Corp. Comm'n*, 137 Ariz. 432, 412; 671 P.2d 410, 412; (Ariz. App. 1982), citing *Corporation Comm'n v. Peoples Freight Line, Inc.*, 41 Ariz. 158, 16 P.2d 420 (1932). In exchange for the monopoly, Utility's provision of those services is "subject to vigilant and continuous regulation" by the Corporation Commission.

> Appellant misconceives the fundamental nature of the Certificate of Public Convenience and Necessity, and the implications of the theory of regulated monopoly which has been adopted in Arizona. The monopoly is tolerated only because it is to be subject to vigilant and continuous regulation by the Corporation Commission, and is subject to rescission, alteration or amendment at any time upon proper notice when the public interest would be served by such action.

Davis v. Corporation Comm'n, 96 Ariz. 215, 218; 393 P.2d 909, 911 (1964) ("*Davis*").

And there is no doubt that Utility specifically asked for and received a monopoly on water services and wastewater services, including the provision of effluent. Utility's initial

CC&N was granted by Decision No. 60223, dated May 27, 1997. The CC&N was for the original area known as Johnson Ranch. Finding of Fact 13 states:

> The first phase of JUC's wastewater treatment system will have a capacity of 300,000 gallons-per-day, and will include collection mains, effluent pumping and transmission lines, and an irrigated lagoon system and wetlands marsh. Plans call for treated effluent to be used on a planned golf course. (Emphasis added.)

This golf course is of course now Swing First's Golf Club at Utility Ranch. Utility specifically asked for a monopoly on delivering and selling effluent to what became Swing First's golf course. Effluent service to that golf course is specifically at issue in the above-captioned docket. *Davis* consequently requires that Utility's effluent deliveries and sales to Swing First be subject to "vigilant and continuous regulation by the Corporation Commission."

Finding of Fact 21 sets forth the "initial rates and charges for JUC's water and wastewater service as recommended by Staff and proposed by JUC ..." including the effluent Charge of $200/AF or $0.62/1000 gallons. So Utility asked the Commission for a CC&N for wastewater services including the provision of effluent at the $0.62/1000 gallon rate.

Conclusion of Law 5 stated: "The public convenience and necessity require the issuance of a Certificate to Applicant authorizing it to provide water and wastewater service to the public in the areas sought to be certificated herein."

Conclusion of Law 6 stated: "The rates and charges authorized hereinafter are just and reasonable."

Finally, the Commission ordered:

> IT IS THREFORE ORDERED that the application of Johnson Utilities. L.L.C. dba Johnson Utilities Company for a Certificate of Convenience and Necessity authorizing it to construct, maintain and operate facilities in order to provide water and wastewater treatment service to the public in the area more fully described in Exhibit A be and is hereby granted ...
>
> IT IS FURTHER ORDERED that on or before May 30, 1997 Johnson Utilities L.L.C. dba Johnson Utilities shall file a tariff containing the following rates and charges for its water and waste water services:
>
> ...
>
> EFFLUENT CHARGE

Per acre foot	$200.00
Per 1,000 gallons	0.62

It is clear that Utility applied for a monopoly to provide water and wastewater services to Johnson Ranch, which included the provision of effluent at $0.62 per 1000 gallons. The Commission approved Utility's application and granted the CC&N, which gave Utility its requested monopoly, including a monopoly on selling effluent, but also subjected all services including effluent sales to "vigilant and continuous regulation by the Corporation Commission."

Utility cannot unilaterally discontinue a monopoly service that it requested and the Commission approved as part of its CC&N. *Davis* makes it clear that Utility cannot alter or escape its CC&N obligations, including discontinuing effluent deliveries and sales, without an application, a properly noticed public hearing and a finding that the requested alteration is in the public interest. The CC&N is "subject to rescission, alteration or amendment at any time upon proper notice when the public interest would be served by such action." *Id.*

B Even absent a CC&N, the Constitution requires the Commission to regulate Utility's effluent sales for irrigation.

Arizona's Constitution requires that the Commission oversee and regulate Utility's sales of effluent for irrigation: Article 14, Section 2, defines Utility as a public service corporation in connection with its effluent sales:

> All corporations other than municipal engaged … in furnishing water for irrigation … or engaged in collecting, transporting, treating, purifying and disposing of sewage through a system, for profit; shall be deemed public service corporations.

Section 3 then goes on to grant the Commission full jurisdiction to regulate public service corporations such as Utility:

> The corporation commission shall have full power to, and shall, prescribe just and reasonable classifications to be used and just and reasonable rates and charges to be made and collected, by public service corporations within the state for service rendered therein, and make reasonable rules, regulations, and orders, by which such corporations shall be governed in the transaction of business within the state, and may prescribe the forms of contracts and the systems of keeping accounts to be used by such corporations in transacting such business, and make and enforce

> reasonable rules, regulations, and orders for the convenience, comfort, and safety, and the preservation of the health, of the employees and patrons of such corporations … .

There are two separate reasons why Utility's effluent sales to Swing First and other customers make it a public service corporation subject to comprehensive Commission regulation. First, Utility is providing class A+ effluent, *ultra-pure water*, to Swing First and other customers for irrigation. Therefore, Utility is a private, for-profit corporation "furnishing water for irrigation," which makes it a public service corporation under Section 2 and thereby subject to the Commission's comprehensive jurisdiction under Section 3. Second, Utility is also a private, for-profit corporation "engaged in collecting, transporting, treating, purifying and disposing of sewage through a system." It treats and purifies sewage to class A+ standards and then disposes of it through its system by delivering it to Swing First and other customers. This also makes it a public service corporation under Section 2 and thereby subject to the Commission's comprehensive jurisdiction under Section 3. No matter how one looks at Utility, as a water company or as a sewer company, the Constitution requires comprehensive Commission regulation of Utility's effluent sales.

Utility relies on two cases to argue that it is not selling water for irrigation and therefore is not subject to Commission regulation. Neither is remotely persuasive. The first case is *Arizona Public Service Company v. John F. Long*, 160 Ariz. 429, 773 P.2d 988 (1989) ("*Long*"). The case is inapplicable. In *Long*, Arizona Public Service Company ("APS") purchased from Phoenix and other cities effluent to be used in cooling towers at the APS Palo Verde Nuclear Power Plant. The Supreme Court not surprisingly concluded that this effluent was not subject to Arizona Groundwater or Surface Water regulation. The effluent sales were by municipal corporations, so Corporation Commission jurisdiction was never raised or addressed.

The second case relied on by Utility is equally unpersuasive, *Arizona Water Company v. City of Bisbee,* 172 Ariz. 176, 836 P.2d 389 (Ct. App. 1991) ("*Bisbee*"). In *Bisbee*, Arizona Water claimed that effluent sales by the City to Phelps Dodge Corporation for copper leaching violated Arizona Water's CC&N rights. *Bisbee* is distinguishable for many reasons:

1. The City was not subject to Commission regulation. As a municipal corporation, it was exempt from Commission regulation.

2. Arizona Water did not have a sewer CC&N, only a water CC&N. It could not even generate or deliver effluent to the mine. Even a for-profit corporation that held a sewer CC&N could have sold effluent to the mine without regard to Arizona Water's water CC&N.

3. The effluent being delivered to the mine was barely treated and unfit for any other purpose, let alone golf-course irrigation:

> The effluent contains pathogenic bacteria, fecal coliform bacteria, and metals such as arsenic and cadmium. It is not fit either for irrigation purposes or for human consumption.
>
> *Bisbee*, 172 Ariz. at 177, 836 P.2d at 390.

In contrast, Utility is delivering Class A+ reclaimed water, entirely fit for irrigation.

4. Like *Long*, the *Bisbee* Court concluded that noxious wastewater was neither groundwater nor surface water under the laws in effect at that time. This conclusion is not relevant today. The statutes cited have been largely repealed and replaced by Title 49's Water Quality Control statutes, which no longer refer to effluent, but instead to "reclaimed water." The effluent at issue in *Bisbee* would not meet even the minimum standards in effect today for reuse of reclaimed water. See generally A.A.C. § R18-11, Art. 3. Even Class C reclaimed water, the lowest class, is fit for many types of irrigation. A.A.C. § R18-11, Art. 3, Table A.

5. Because it can be used for all types of irrigation, including food crops (A.A.C. § R18-11, Art. 3, Table A), Class A+ reclaimed water is water for purposes of Article 14, Section 2, which specifically includes irrigation as a regulated use. The Class A+ water delivered to Swing First is the highest grade of reclaimed water.

> Class A+ [reclaimed] water is the highest grade of reclaimed water recognized under Arizona statutes and regulations. … It undergoes specific advanced treatment requirements, including tertiary treatment with disinfection. In addition, the reclaimed water will comply with

> specific monitoring requirements, including frequent microbiological testing to assure pathogens are removed, and reporting requirements.

Navajo Nation v. United States Forest Serv., 408 F. Supp. 2d 866, 887 (2006). See also, A.A.C. § R18-11-303.

6. *Bisbee* was consistent with sound public policy. It is axiomatic that it is public policy in Arizona to conserve groundwater. Arizona Water wanted to instead serve the mine with groundwater delivered from its system. The Court's decision to allow the City to deliver poor quality effluent was therefore consistent with Arizona's public policy to conserve groundwater. By contrast, Utility wants to stop delivering effluent to irrigate Swing First's golf course and instead pump groundwater for the same purpose. Utility would act inconsistently with Arizona public policy.
7. Even if we were to accept the far-fetched proposition that Class A+ reclaimed water was not water for purposes of Section 2, Utility would still be subject to Commission regulation. Arizona Water was not a sewer company. By contrast, under Section 2, Utility is a sewer company, a private, for-profit corporation "engaged in collecting, transporting, treating, purifying and disposing of sewage through a system." It treats and purifies sewage to class A+ standards and disposes of it through its system by delivering it to Swing First and other customers.

Utility also inexplicably discusses a recent Commission Decision concerning approval of an effluent sale by Liberty Utilities ("Liberty") in Dockets SW-01428A-14-0369 and W-01427A-14-0369. Utility argues that the Liberty Decision supports the proposition that effluent sales are not jurisdictional. However, the Liberty Decision completely undercuts Utility's position. It clearly states that effluent sales are subject to Commission jurisdiction.

First, Liberty demonstrated how a responsible public service corporation should behave. Liberty proposed to enter into a transaction, but it was not certain about the Commission's jurisdiction. So, rather than just going ahead regardless of the consequences, Liberty filed an application to allow Staff and the Commission to evaluate the transaction. This is exactly what

Swing First asks the Commission require Utility to do: file an application to determine if the public interest supports discontinuing a tariffed service.

This leads to a second distinction. Utility asked for and received a monopoly to provide wastewater service, including effluent sales to the Johnson Ranch golf course. Under Arizona's monopoly theory of regulation, it therefore submitted itself to the Commission's "vigilant and continuous regulation." Utility intends to unilaterally discontinue a tariffed service, approved as part of its very first CC&N application. In contrast, Liberty proposed to act in accordance with an existing effluent tariff that allowed it to sell effluent at a negotiated amount, not to exceed $430 per acre-foot. Liberty sought and received Commission approval to "sell all or any excess effluent to the CAGRD at a rate not to exceed [Liberty's] Commission-authorized rate, unless approved to do so by the Commission." Decision No. 74993 at 15:18-21.

A third clear distinction is that Liberty sought to sell excess effluent that was not already committed to other customers. Even then, Liberty was cautious and prudently sought and received Commission approval. In stark contradistinction, Utility intends to stop selling committed effluent to a long-term customer and to replace the effluent with costly, precious groundwater, while flouting the Commission's jurisdiction. Liberty knows how to behave as a responsible public service corporation; Utility does not.

Fourth, the Commission found that ratepayers would benefit from Liberty's proposed transaction. Utility instead acted unilaterally without benefit of any Commission finding of ratepayer or public benefit.

Finally, the Commission found that it had jurisdiction over Liberty's proposed transaction. "The Commission has jurisdiction over Liberty Utilities and of the subject matter of its application." Decision No. 74993 at 15:9-10. Just as the Commission had jurisdiction over Liberty's effluent transaction, it has jurisdiction over Utility's effluent transactions. This is consistent with the plain language of the Constitution – Utility's effluent sales are subject to comprehensive Commission regulation. There is no contrary case law.

C **Utility's discrimination in favor of an affiliate also provides the Commission jurisdiction to hear this complaint.**

According to the Commission's website, Utility is owned by the George H Johnson Rev. Trust, Jana S Johnson, and George H Johnson. A nearby golf course, the Club at Oasis L.L.C. ("Oasis"), is owned by George Johnson's son, Chris Johnson and another affiliate, Hunt Management LLC. Utility, George Johnson, Chris Johnson, and Hunt Management LLC all share offices at 5310 E Shea Blvd, Scottsdale, AZ 85254.

In its November 2015 newsletter to its customers, Utility bragged that it was providing effluent to the Oasis golf course.

> With conservation in mind, the grass at the Oasis Golf Course is irrigated with reclaimed water from the Johnson Utilities system. Instead of using our precious groundwater, we put the reclaimed water to beneficial use. Eventually, that reclaimed water reaches the aquifer and is recycled.

It is beyond ironic that for Swing First, Utility would blatantly ignore conservation, disregard the preciousness of ground water, and not put its reclaimed water to beneficial use.

The newsletter further establishes that Utility effectively controls and operates the Oasis golf course.

> Recently, we built new water features on every fairway at the golf course. These water features allow for efficient disposal and recycling of excess reclaimed water. Feedback from golfers provide that these water features add to the beauty of the course. It's a win-win situation for everyone. We get to recycle precious water and the neighbors have a nice view of beautiful grass year round.

Yet, Utility intends to deny the neighbors around Swing First's golf course the ability to "have a nice view of beautiful grass year round.

Utility's actions are a prima facie example of illegal discrimination. Utility clearly intends to benefit Oasis, its commonly controlled affiliate, by destroying a competitor's golf course. This gives the Commission yet another basis for jurisdiction over Swing First's Complaint. A.R.S. 40-243 provides the Commission full authority to deal with discriminatory rates or service:

> When the commission finds that the rates, fares, tolls, rentals, charges or classifications, or any of them, demanded or collected by any public service

corporation for any service, product or commodity, or in connection therewith, or that the rules, regulations, practices or contracts, are unjust, discriminatory or preferential, illegal or insufficient, the commission shall determine and prescribe them by order, as provided in this title.

III Swing First has unassailable contractual rights to demand and receive effluent

Swing First has three contracts with Utility, each of which requires Utility to deliver and sell effluent to Swing First. Swing First will discuss each of them in order of their execution.

A The Utility Services Agreement gives Swing First first right to effluent deliveries in Utility's service territory[3]

On September 17, 1999, in connection with the sale of the Johnson Ranch Golf course by Utility and related parties, Utility, and various parties related to Utility, executed an Agreement Regarding Utility Service ("Utility Service Agreement") with Johnson Ranch Holdings LLC ("Holdings"), an affiliate of Sunbelt Holdings Management, Inc., an Arizona Corporation ("Sunbelt"). Paragraph 9 of the Utility Services Agreement provided Sunbelt the first right to irrigate the Johnson Ranch Golf Courses with any effluent generated by Utility within its service territory.[4] The Utility Services Agreement also gives Utility the right to deliver water from other sources (wells or CAP-water), but provides that, if Utility exercises this right it cannot charge more than the Commission-approved effluent rate.

On November 8, 2004, Swing First acquired The Golf Club at Johnson Ranch from Sunbelt. As part of his due diligence prior to the purchase, David Ashton, Swing First's manager, met with Utility to discuss the availability of effluent for golf course irrigation. Mr. Ashton was told that effluent could be made available in a year or so from Utility's Santan Wastewater treatment plant, but Swing First would have to fund construction of a delivery pipeline from the 18th-hole lake to Utility's Hunt Highway pipeline. Mr. Ashton also attempted several times to get Utility's formal consent to assignment of the Utility Services Agreement.

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[3] This section is largely based on sworn testimony and documents from Maricopa County Superior Court Docket No. CV2008-000141, where Swing First was, among other awards, awarded damages for Utility's breach of contract.

[4] As previously discussed in Section I(A), above, Utility had then recently been granted the right to sell effluent to the Johnson Ranch Golf Course, which was at that time Utility's only potential effluent customer.

Instead of a formal assignment, Utility ultimately proposed that the parties would operate and would continue to operate as if the Agreement, particularly Paragraph 9, was in effect. Mr. Ashton accepted this proposal on behalf of Swing First. Swing First relied on Utility's representations and caused the effluent-delivery pipeline to be built.

In March 2006, Utility completed its Santan Wastewater Treatment Plant and began delivering Class A+ reclaimed water from the plant to Swing First. Utility billed Swing First at the then tariff rate of $0.62 per thousand gallons. Although the Utility Services Agreement was never formally assigned, both Swing First and Utility continued to treat it as applying to both the parties. As late as December 2007, Utility was sending emails to Swing First purporting to rely on sections of the Utility Services Agreement. Then in early 2008, Utility actually sued Swing First for breach of the Utility Services Agreement, thereby instituting Maricopa County Superior Court Docket No. CV2008-000141, where Swing First prevailed and was awarded damages for Utility's breach of contract.

It is clear that Swing First and Utility are parties to the Utility Services Agreement, which predates all of Utility's other effluent agreements. Swing First believes that it was assigned based on the parties conduct. In the alternative, Swing First and Utility entered into an oral agreement providing for effluent deliveries from the Santan Wastewater Treatment Plant, consistent with the terms of the Utility Services Agreement. Evidence of an oral agreement includes:

- Swing First built the effluent pipeline in reliance on Utility's promise to deliver effluent;
- Utility began effluent deliveries to Swing First in March 2006, immediately after completion of the Santan Wastewater Treatment Plant;
- Utility rendered effluent bills at the approved tariff rate;
- Swing First's took and paid for effluent at the tariff rate;
- The parties regularly communicated their understanding that Swing First was entitled to take effluent deliveries up its full irrigation requirements.

B The Commission-approved ffluent tariff is an enforceable contract between the parties

On August 27, 2015, the Court of Appeals (Division One) issued its Memorandum Decision in *Johnson Utils., LLC v. Swing First Golf, LLC*, 2015 Ariz. App. LEXIS 167 ("*Memorandum Decision*"), which confirmed in entirety the Superior Court's verdicts in Docket No. CV2008-000141. (Copy attached as **Exhibit A**). Although the *Memorandum Decision* may not be cited as precedent, between the parties it may be cited "to establish claim preclusion, issue preclusion, or law of the case." Ariz. Sup. Ct. R. 111(c)(1)(A). In other words the *Memorandum Decision* binds the parties.

First, throughout the Memorandum Decision, the Court of Appeals consistently refers to the parties' contract dispute as a "Breach of Contract Tariff Claim." Second, the Court specifically found that there was an enforceable contract between the parties and sufficient, credible evidence that Utility breached the contract and damaged Swing First. The Court's discussion is worth quoting at length.

> To prevail on its breach of contract claim, SFG was required to prove it had a contract with Utility, Utility breached the contract, and SFG suffered resulting damages. *See Goodman v. Physical Res. Eng'g, Inc.*, 229 Ariz. 25, 28, ¶ 7, 270 P.3d 852, 855 (App. 2011). Utility does not dispute the existence of a contract – it provided irrigation water to SFG for a fee. Instead, Utility argues that SFG claimed that it had a right to effluent for its irrigation water, but failed to prove a contractual right to effluent instead of CAP water. The record belies the focus of the argument.
>
> SFG presented evidence to the jury that Utility breached its tariff contract by: (1) overcharging SFG for deliveries of both CAP water and effluent; (2) withholding effluent; (3) improperly charging for minimum bills; (4) over-delivering irrigation water resulting in flooding of the golf course; (5) manufacturing bills; (6) using a manufactured account balance as a pretext to discontinue service; (7) failing to follow Arizona Administrative code regulations; and (8) not providing appropriate credits for overcharges. And citing to A.R.S. § 47-2306(B), SFG also claimed that Utility breached its contracts by failing to use its best efforts to deliver effluent to SFG.
>
> Because the water rates that Utility can charge its customers for CAP water and effluent are set by the ACC, the approved tariffs constitute an enforceable contract between Utility and its customer, SFG. *See Sommer*, 21 Ariz. App. at 387-88, 519 P.2d at 876-77. SFG presented evidence that Utility breached the

> contract. SFG also presented evidence that it was damaged as a result of Utility's breach and the amount of those damages, including the amount SFG overpaid between November 2006 and December 2007.
>
> The jury heard the testimony. The jury had to determine the credibility of the witnesses, evaluate the exhibits and determine the facts in reaching its verdict. *See Logerquist v. McVey*, 196 Ariz. 470, 488, ¶ 52, 1 P.3d 113, 131 (2000). The jury fulfilled its role, found that Utility had breached the tariff rates, and awarded SFG $41,883.11 in damages. Because substantial evidence supported the jury's breach of tariff contract verdict, we find no error.

Memorandum Decision at 8, ¶¶ 20-23. (Emphasis added.)

Utility is estopped from arguing that there is no contract with Swing First. The Court of Appeals has concluded that the Tariff Contract is an enforceable contract and Utility cannot lawfully argue otherwise. In fact, the Tariff Contract is the only one of Utility's alleged effluent agreements that has actually been judged to be enforceable. By contrast, it is highly doubtful that the alleged Oasis effluent agreement, which Utility executed with itself, is even enforceable.

C In January 2016, Swing First and Utility executed a third enforceable effluent agreement

Utility was subject to Notice of Violation ("NOV") No. 159676 from the Arizona Department of Environmental Quality ("ADEQ").[5] The NOV required Utility to obtain and submit effluent end-user agreements with Johnson Ranch Golf Course, the San Tan Heights Community HOA, and Cross Cane Land & Cattle.

To resolve the NOV, Utility solicited an end-user agreement from Swing First. The end-user agreement required Swing First to estimate its annual effluent usage. On January 11, 2016, Utility prepared and provided Swing First an end-user application incorporating the estimated 390 AF effluent usage. (A copy of Brad Cole's email and the attached draft agreement is attached as **Exhibit C**.) Mr. Cole asked Swing First to sign and return the agreement by January 12, 2016. Otherwise, Utility would be out of compliance with ADEQ.

[5] See Utility's December 30, 2015, filing in Docket Nos. WS-02987A-99-0583; WS-02987A-00-0618; W-02234A-00-0371; W-02859A-00-0774; and W-01395A-00-0784.

Based on consumption over the last five years (See Exhibit C), Swing First stated that it would need a commitment of 425 AF of effluent per year. On January 11, 2016, undersigned counsel received a phone call from George Johnson, Utility's owner, and Brad Cole, Utility's chief operating officer. Mr. Johnson was quite agitated and said that he needed the signed agreement by the next day or Utility would be out of compliance with ADEQ. Mr. Johnson stated that if Swing First signed the end-user agreement at 390 AF, he would commit to provide any additional effluent needed by Swing First for irrigation during high-usage summer months. He stated that "you can record this" if you need assurances. Mr. Marks stated that he would prefer to send an email memorializing the agreement, with a responsive email confirming the parties' supplemental agreement.

To that end, on Tuesday, January 12, 2016, Mr. Marks sent Brad Cole an email attaching the signed end-user agreement and stating:

> Brad,
>
> I have attached the effluent application that you requested. For the record, Swing First has been an effluent customer of Johnson Utilities since March 2006. Johnson Utilities asked Swing First to execute a new Effluent Application in order to resolve Notice of Violation No. 159676, which required the Company to submit end-user agreements with existing effluent customers to ADEQ. As I discussed yesterday with you and George, the 390 AF annual estimated usage may not be enough in all years to irrigate Swing First's Johnson Ranch Golf Course. We would have preferred to have submitted effluent usage at 425 AF, but have accepted your offer yesterday that Swing First will submit the lower number but, notwithstanding that submission, Johnson Utilities will provide up to an additional 35 AF/year to Swing First as needed, provided that the effluent is used only to irrigate the golf course and not for other entities in the area.
>
> This application is being submitted strictly in accordance with yesterday's agreement, as an accommodation to Johnson Utilities so that it may resolve NOV 159676, and with that this accommodation does not abridge or modify any existing rights of Swing First to receive effluent from Johnson Utilities.
>
> Please confirm your understanding of our agreement.
>
> Craig

(A copy of Mr. Marks' email and the attached agreement is attached as **Exhibit D**.)

With the signed agreement, Utility was able to represent to ADEQ that it had a Class A+ Reclaimed Water Agreement in place with Swing First and thereby resolve the NOV.

The Reclaimed Water Agreement has all the specificity required for a contract:

- The parties are identified.
- The subject is effluent deliveries.
- The price is specified (the tariff rate).
- The delivery location, account number, and meter number are specified.
- The billing terms are described in details.
- Various activities are required or prohibited.
- Annual usage is estimated at 390 AF/Yr.

The Agreement was offered to Swing First and accepted by its authorized signature. Finally, the Agreement was subject to the parties' oral supplemental agreement that Utility committed to provide any additional effluent needed by Swing First for irrigation during high-usage summer months. Utility may now regret offering the agreement to Swing First to accept, but that does not allow it to void the agreement, particularly after it had used the agreement to resolve its ADEQ NOV.

The Class A+ Reclaimed Water Agreement manifests Utility's enforceable commitments to provide effluent to Swing First with annual usage estimated at 390 AF/Yr. and to provide any additional effluent needed by Swing First for irrigation during high-usage summer months. This was the third time that Utility has contractually committed to these undertakings, yet Utility still incredibly claims that Swing First has no existing effluent contract. (See April 6, 2006, Procedural Conference Transcript at 28.)

The evidence is overwhelming that Swing First has three contracts in place that commit Utility to deliver effluent to Swing First. The terms may differ slightly, but the differences are immaterial.

IV Utility misrepresented its intentions to the Commission and clearly intends to discriminate against Swing First

At the April 6, 2016, Procedural Conference, Utility told the Commission through Mr. Crockett that it would be discontinuing effluent sales to all effluent customers within a year and would be recharging all effluent to receive water credits. Judge Kinsey seemed quite concerned that Utility was singling out Swing First:

> ALJ KINSEY: I just -- it's just giving me pause, though, that we seem to have the cost saving efforts for the recharge that have been, you know, placed on Swing First Golf but not on Oasis. What is the plan to do that, and what is the time frame?
>
> MR. CROCKETT: The permitting is underway for all of these recharge facilities. I don't -- I would say that the timing is within a year, probably, for the Section 11 Plant. But the plan is that all of the, all of the effluent generated from the company's Pecan Plant, San Tan Plant, Section 11, and the Anthem Plants would be recharged so that we can reduce that tax liability that is paid every year.

Tr. at 10:11-24.

Although the transcript does not reveal this, the video record shows that Mr. Crockett carefully consulted with Mr. Johnson and Mr. Cole before making these representations. Yet, less than two weeks later, Mr. Crockett's representations to the Commission were proved false.

Utility completely walked back its representations through an April 19, 2016, letter to the docket (Copy attached as **Exhibit B**) from Brad Cole, Utility's Chief Operating Officer. Mr. Cole stated that Utility intended to continue effluent sales indefinitely to all existing customers, , including Utility's Oasis Golf Course, *discontinuing sales only to Swing First.*[6]

> The Golf Club at Oasis has an agreement in place for which Johnson Utilities has obligations to deliver effluent, whereas SFG does not have an agreement in place. … The Poston Butte Golf Course and the Encanterra Golf Course, the other two golf courses in the San Tan Valley, both have agreements with Johnson Utilities to either take effluent or obligate Johnson Utilities to deliver effluent.

Swing First would be the only golf course in the San Tan Valley to which Utility would stop delivering effluent, even though Swing First is Utility's oldest effluent customer and has three contracts in place that require Utility to deliver effluent. Utility clearly intends to

[6] The letter did not discuss sales to the San Tan Heights Homeowner's Association.

discriminate against Swing First in favor of the other golf courses, especially the Oasis, its own golf course.

V Utility's effluent discontinuation will benefit nobody except Utility and its affiliate

As Utility has now made clear, it would discontinue effluent service only to Swing First.[7] Yet, it wraps its naked discrimination in a blanket of feigned customer benefits. Mr. Crockett explained how customers would allegedly benefit. Speaking about Utility's plans to recharge effluent into the aquifer he said:

> When they recharge effluent, they get a one for one credit, roughly a one to one credit against their pumping. So for every acre foot that they recharge, they avoid paying a $650 tax on that. That, because the company has a CAGRD adjustor mechanism, that tax is passed through directly to the customers as an additional charge on its, on its water bill. And so as we recharge effluent, we can substantially reduce the amount of that tax, which would apply to all the water we pump, including water that's delivered to the Swing First Golf Course.

Tr. at 9:16 – 10:1. This sounds plausible but disintegrates under even a cursory examination.

Recharging the effluent currently consumed by Swing First would provide no net customer benefit. For every acre-foot of effluent recharged, Utility would have to pump and deliver an acre-foot of groundwater from the new well required to deliver water pursuant to Utility's groundwater tariff. Swing First currently purchases approximately 400 AF per year of effluent from Utility. As a member of the Central Arizona Groundwater Replenishment District ("CAGRD"), Phoenix Active Management Area, Utility reports its total groundwater usage to CAGRD. Based on the reported groundwater usage, the CAGRD calculates Utility's CAGRD Replenishment Obligation and bills Utility for its Annual Replenishment Assessment/Tax. Because effluent is reclaimed water, not groundwater, Utility does not include the 400 AF delivered to Swing First in its annual report and is not assessed any tax for these deliveries.

Now, consider what would happen if the Commission were to sanction Utility's scheme. Utility would recharge 400 AF of effluent and generate a recharge credit that it could use to offset groundwater usage and the resulting tax. However, to serve Swing First, Utility would

[7] The status of effluent deliveries to the San Tan Heights Homeowner's Association is not known.

have to pump and deliver an additional 400 AF from its new well. So, Utility's annual groundwater usage would increase by 400 AF, which would exactly offset the value of the new recharge credits. Utility would also purchase additional electricity to pump the water. There would be no net direct customer benefit; in fact there would be an overall detriment. And Swing First would be driven into bankruptcy, while property values in the Johnson Ranch community would plummet. The public interest clearly would not be served by Utility's scheme.

This is why Swing First refers to Utility's scheme as a shell game. Utility would only move the peanut from one shell to the other. Customers would be no better off. But, like in any shell game, there has to be a loser – in this case Swing First, the unwilling dupe of Utility's deception.

Utility's real game is to drive a competitor out of business. The Commission should not be fooled and unwittingly back Utility's naked discrimination.

VI Utility's actions are contrary to sound public policy and precedent

A The new non-potable tariff was not intended to displace the effluent tariff

Utility's notice to Swing First states "Beginning on February 24, 2015, Johnson Utilities will begin serving you non-potable water pursuant to the Johnson Utilities tariff." Utility's tariff authorizes Utility to sell non-potable water at the rate of $0.84 per thousand gallons plus the applicable CAGRD fee. In Decision No. 75462, dated February 16, 2016, the Commission set Utility's 2016 CAGRD fee at $2.52 per thousand gallons. The total non-potable water rate is now $3.36 per thousand gallons, over five times the effluent rate of $0.63 per thousand gallons. If the Commission allows Utility to unilaterally discontinue its tariffed effluent sales, Swing First's annual irrigation bill will soar from approximately $100,000 per year to over $500,000 per year!

In Decision No. 73521, dated October 4, 2012, the Commission approved a new non-potable water tariff for Utility. (A copy of Decision No. 73521 is attached as **Exhibit E**.) As discussed in the Decision, the new tariff was needed because the Central Arizona Project

("CAP") would no longer have excess non-potable CAP water available for sale to Utility. Utility had previously been purchasing the excess CAP water for sale pursuant to a Commission-approved tariff.

At the time of its application, Utility had one CAP-water customer, which would no longer be able to receive CAP-water. "The Company is proposing this new tariff to accommodate this customer."[8] Exhibit E at 2:17. But Utility hid its real agenda. Nowhere did Utility tell the Commission that it intended to replace its effluent deliveries with groundwater pumped and delivered under terms of the proposed non-potable tariff. The groundwater tariff was approved to replace an existing CAP water tariff, not to replace a long-time effluent tariff.

B Discontinuing effluent sales would be contrary to established Commission policy

Utility's discontinuation of effluent sales would be contrary to established Commission policy. Utility intends to sell groundwater to Swing First for irrigation. Yet, the Commission has routinely prohibited utilities from selling groundwater for golf course irrigation.

> IT IS FURTHER ORDERED that in light of the on-going drought conditions in Arizona and the need to conserve groundwater, Willow Springs Utilities is prohibited from selling groundwater for the purpose of irrigating any golf course, or any ornamental lakes or water features located in the common areas of the development.

Willow Springs Utilities, LLC, Decision No. 68963, dated September 21, 2006, at 16:19-22.[9]

The Commission has also prohibited Utility from using groundwater for golf-course irrigation. In Docket No. WS-02987A-09-0083, the Commission approved Utility's application for a massive extension of its water and sewer CC&Ns to new developments known as

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[8] Utility misrepresented to the Commission that one other customer could be interested in the new tariff, "an 18-hole golf course which currently receives treated effluent from the Company's San Tan wastewater treatment plant." Exhibit E at 3:6-7. This was an obvious reference to Swing First and a total fabrication. Utility never spoke with Swing First to determine any apparent interest. Further, no sane customer would voluntarily replace low-priced, environmentally friendly effluent with scarce groundwater priced five times higher.

[9] Accord: *Chaparral City Water Company*, Decision No. 68176; *Arizona Water Company*, Decision No. 68919; *Pichaco Water Company*, Decision No. 69174; *Green Acres Water LLC*, Decision No. 69256; *Double Diamond Utilities LLC,* Decision No. 70352; *Perkins Mountain Utility Company*, Decision No. 70663; *Wickenburg Ranch Water LLC*, Decision No. 70741; and *ICR Water Users Association, Inc.*, Decision No. 70977.

Caballero, Bella Vista Farms, Anthem at Merrill Ranch and Nevitt Farms. In Decision No. 73236, dated June 26, 2012, the Commission approved Utility's application, but prohibited the use of groundwater for golf-course irrigation.

> IT IS FURTHER ORDERED that in light of the need to conserve groundwater in Arizona, Johnson Utilities, LLC is prohibited from selling groundwater for the purposes of watering any golf courses or common turf areas or any ornamental lakes or water features located in the common areas of the proposed new developments within the certificated expansion areas.

Decision No. 73236 at 11:24-27. Yet Utility seeks to act contrary to the Commission's expressed need to conserve Arizona groundwater.

The Commission's strong preference in favor of effluent irrigation for golf courses is consistent with overall Arizona public policy. For example, the City of Scottsdale's municipal utility currently supplies effluent for irrigating 23 golf courses, making it a global leader in the use of recycled water. http://www.scottsdaleaz.gov/news/scottsdale-water-recognized-as-global-leader-in-recycled-water-use_s4_p21798. This is consistent with Arizona's vision:

> Treating wastewater and using the resulting effluent to meet a range of beneficial purposes is increasingly important, especially in water-scarce regions such as the desert Southwest.

"Water Reuse in Central Arizona, a Technical Report by Decision Center for a Desert City" at 21.[10]

Again, in this Complaint, Swing First is not asking the Commission to determine whether Utility should be allowed to stop selling effluent for irrigation and instead pump and sell groundwater. This is clearly a terrible idea, but if this is what Utility wants to do, it must formally apply for authorization with the Commission so that the Commission can evaluate Utility's proposal after a thorough evidentiary hearing. For now, as is more fully set forth in its Complaint, Swing First is only asking the Commission to order Utility to continue providing effluent to Swing First and other customers at its tariffed rate until such time, if ever, that it receives authorization from the Commission.

[10] https://sustainability.asu.edu/docs/dcdc/website/documents/DCDC_WaterReuse_Final.pdf

VII Decision No 74036 does not bar this Complaint

A The Doctrine of Res Judicata does not apply

Res judicata is more modernly known as "claim preclusion." *In re General Adjudication of All Rights to Use Water In Gila River System and Source*, 212 Ariz. 64, 69; 127 P.3d 882, 887 (Ariz. 2006) ("*Gila River*"). For claim preclusion to apply, the claims must be "related in time, space, origin, or motivation … ." *Id.* 212 Ariz. at 71; 127 P.3d at 889 (quoting Restatement of Torts (2d) § 24(2), cmt. B), (emphasis added). The claims must be based on a "common nucleus of operative facts." *Id.*

A subsequent Arizona case confirmed that res judicata only bars "subsequent claims [that] arise out of the same nucleus of facts." *Howell v. Hodap*, 221 Ariz. 543, 547; 212 P.3d 881, 885 (Ariz.App. Div. 1, 2009). Put another way, "the relevant inquiry is whether [the new claim] could have been brought" in the prior action. *Id.*, quoting *United States ex rel. Barajas v. Northrop Corp.*, 147 F.3d 905, 909 (9th Cir. 1998). "The determinative test asks whether the claims in each case depend upon the same essential facts for their proof." *Bill By and Through Bill v. Gossett*, 132 Ariz. 518, 647 P.2d 649 (Ariz.App., 1982)

The current Complaint is based on an entirely new nucleus of facts and theories. Utility notified Swing First that it is permanently discontinuing all effluent deliveries, a Commission-tariffed service. Utility instead intends to provide groundwater to Swing First, for which the tariff rate is five times the effluent rate. In its Complaint, Swing First has asked the Commission to determine whether Utility can discontinue a tariffed service without authorization.

Applying the test from *Howell v. Hodap*, the current Complaint could not have been brought as part of the previous complaints, including the one resolved by Decision No. 74036. Utility has never previously stated that the Commission has no jurisdiction over Utility's effluent uses. Utility never before stated that it would discontinue a tariffed service without authorization. Utility never has proposed to replace effluent deliveries with pumped, scarece groundwater. Further, Decision No. 74036 was decided before the Court of Appeals issued the

Memorandum Decision, which specifically found that Swing First had an enforceable effluent contract with Utility. This is a new dispute with new issues that requires entirely different relief. It could not have been brought previously and it is not precluded by Decision No. 74036.

Applying the test from *Bill By and Through Bill v. Gossett*, the current claim does not depend on the same essential facts for their proof. The facts in the first Complaint concerned Utility's partial withholding of effluent in 2007 and its overpricing for effluent, CAP Water, and other tariffed services. The facts in 2013 concerned Utility's minimum bill charges, effluent withholding, and effluent quality. None of these facts are relevant in any way to the current Complaint which stands on its own distinct, recent set of facts and issues:

1. Utility informed Swing First and other parties that it intends to discontinue providing tariffed effluent service.
2. Utility did not apply to the Commission for authorization to discontinue tariffed effluent service.
3. Utility asserts that the Commission has no jurisdiction over Utility's effluent usage.
4. Utility asserts that Swing First does not have an enforceable effluent agreement, even though, as discussed above, Swing First has at least three enforceable effluent agreements including the tariff agreement specifically found enforceable by the Court of Appeals.
5. Utility intends to instead provide groundwater to Swing First, which costs over five times the effluent rate.
6. Utility claims a phony public benefit associated with discontinuing effluent deliveries.
7. Utility intends to discriminate in favor of its affiliated golf course by continuing to provide it low-cost effluent.
8. Swing First will be forced out of business if Utility discontinues effluent service.
9. As confirmed by public comments in this docket, closing the golf course would have catastrophic effects on the surrounding Johnson Ranch community.

10. Utility's discontinuation of effluent Service is contrary to Commission policy, which requires the use of effluent for golf course irrigation if available.

Res judicata does not even remotely apply.

B Collateral Estoppel also does not apply

Collateral estoppel also does not apply. Collateral estoppel only concerns legal issues that were actually resolved by the tribunal. "[T]he judgment in the first action precludes relitigation of only those issues actually and necessarily litigated and determined in the first suit." *Nelson v. QHG of South Carolina Inc.*, 354 S.C. 290, 305; 580 S.E.2d 171 (S.C. App., 2003), quoting *Beall v. Doe*, 281 S.C. 363, 369 n. 1; 315 S.E.2d 186, 190, n. 1 (S.C. App., 1984). The Commission has never considered the facts alleged in the current Complaint, nor considered the raised issues, let alone issued any binding opinions concerning them. Further, concerning the previous complaints, no legal issues were actually litigated and the Commission determined no legal issues in Decision No. 74036. Therefore, collateral estoppel also does not apply.

Finally, collateral estoppel does not apply to a judgment entered by consent, such as Swing First's voluntary dismissal.

> [I]ssue preclusion (formerly referred to as collateral estoppel) "attaches only when an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment. In the case of a judgment entered by confession, consent, or default, none of the issues is actually litigated."

Gila River, 212 Ariz. at 70; 127 P.3d at 888 (quoting *Arizona v. California*, 530 U.S. 392, 414, 120 S.Ct. 2304, 147 L.Ed.2d 374 (2000). Concerning the prior complaints, no legal issues were actually litigated and the Commission made no determinations concerning any legal issues. Therefore, collateral estoppel also does not apply.

VIII To provide complete relief, the Commission may award attorney's fees to a successful complainant under A.R.S. §§ 40-246

"The Corporation Commission is given broad authority in Arizona." *Southwest Gas Corp. v. Arizona Corporation Commission*, 169 Ariz. 279, 283, 818 P.2d 714, 718 (App. 1991).

"[U]nlike such bodies in most states, [the Commission] is not a creature of the legislature, but is a constitutional body which owes its existence to provisions in the organic law of this state." *Miller v. Arizona Corp. Comm'n*, 227 Ariz. 21, 24, ¶ 12, 251 P.3d 400, 403 (App. 2011).

Article XV, Section 3 of the Arizona Constitution grants broad powers to the Commission.

> The corporation commission shall have full power to, and shall, prescribe just and reasonable classifications to be used and just and reasonable rates and charges to be made and collected, by public service corporations within the state for service rendered therein, and make reasonable rules, regulations, and orders, by which such corporations shall be governed in the transaction of business within the state, and may prescribe the forms of contracts and the systems of keeping accounts to be used by such corporations in transacting such business ....

Section 3 also provides the Commission "judicial jurisdiction to hear grievances and consumer complaints." *Qwest Corp. v. Kelly*, 204 Ariz. 25, 30, ¶ 13, 59 P.3d 789, 794 (App. 2002). The Constitution grants the Commission "judicial powers that are 'inherent in its responsibility to make those decisions necessary to regulate public service corporations, pursuant to Article 15, Section 3 of the Arizona Constitution.'" Id., quoting *Southwest Gas Corp. v. Arizona Corp. Comm'n*, 169 Ariz. 279, 284, 818 P.2d 714, 719 (App.1991).

Article XV, Section 6 allows the legislature to "enlarge the powers and extend the duties of the corporation commission ... ." Under that authority the legislature enacted "statutes empowering the Commission to control almost every aspect of public service corporations." *Campbell v. Mountain States Tel. & Tel. Co.*, 120 Ariz. 426, 431, 586 P.2d 987, 992 (App. 1978). Particularly, the legislature passed A.R.S. §§ 40-246 and 40-248, under which this Complaint was brought.

Swing First does not rely on any specific statute that authorizes the Commission to award attorneys' fees. The Commission does not need such statutory authority. As part of its broad and deep authority to regulate the actions of public service corporations, the Commission can and does provide extraordinary relief that is not specifically authorized by statute. For example, the Commission can fine a utility to discourage future bad behavior and encourage compliance.

See, e.g. Decision No. 74504, dated May 30, 2014. The Commission can also replace current management with an interim manager when the public health and safety is threatened. See, e.g. Decision No. 74234, dated December 31, 2013. The Commission can disallow plant from rate base because of poor record-keeping or excess affiliate profits. See, e.g. Decision No. 71854, dated August 25, 2010. None of these remedies are specified by statute.

This present Complaint is not just an ordinary dispute between a utility and one of its customers, where there is no apparent malice on the part of the utility. In contrast, given the extensive litigation history, it is clear that Utility has been engaged in a long-term campaign—fought by abusing its monopoly power, withholding effluent, charging far more than lawful rates, and by other means—to try to drive Swing First out of business. The Commission needs to send a message that such behavior will not be tolerated. Significant fines would certainly be warranted.

Swing First could not possibly represent itself without counsel in this case. Utility has deep pockets and is represented by an experienced, competent attorney. To have any chance of prevailing, Swing First was forced to secure its own legal representation. For a $200 million company, its attorneys' fees in this case are barely noticeable. For a small company like Swing First, attorneys' fees quickly become a major expense.

This case began because Utility unilaterally discontinued a tariff and abridged its CC&N obligations. Utility has had every opportunity to admit its errors and restore effluent service. Instead it has dug in its heels and forced additional legal expense on Swing First, including those associated with researching and preparing this brief. Utility has already mislead the Commission by asserting that it would be discontinuing effluent tariff deliveries to all customers and then admitting less than two weeks later that it was singling out Swing First. Utility has thumbed its nose at the Court of Appeals' finding that Swing First has an enforceable effluent agreement. Utility has tried to cloak its naked discrimination in favor of its own competing golf course by dreaming up a phony public benefit for withholding effluent and pumping even more groundwater. All of this has wasted the time of Commission Staff, Hearing Division, and the

Commissioners. The Commission has the power to and should send Utility a message that this type of behavior will not be tolerated.

Swing First cannot be provided complete relief unless Utility is ordered to pay its legal bills. Further, Swing First's request is consistent with sound public policy. Customers should not be deterred from pursuing legitimate complaints under A.R.S. §§ 40-246 because they cannot afford an attorney. If the customer prevails, the Commission should award attorneys' fees and costs to fully compensate the complaining customer, particularly when the utility has acted with malice.

IX Conclusion

The Commission has full jurisdiction to deal with Utility's unauthorized discontinuation of a tariffed service and its illegal discrimination in favor of its affiliate. As this Complaint involves entirely new facts and issues, none of which have been considered by the Commission, neither res judicata nor collateral estoppel bars this Complaint. Further, this Complaint raised issues of great public importance, well beyond the impacts on Swing First, which only the Commission can resolve.

Swing First asks the Commission to expeditiously proceed to consider the issue of whether Utility can unilaterally discontinue a tariffed service and also whether Utility can discriminate in favor of its commonly controlled affiliate.

RESPECTFULLY SUBMITTED on April 29, 2016.

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Original and 13 copies **filed**
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Exhibit A

ARIZONA COURT OF APPEALS
DIVISION ONE

JOHNSON UTILITIES, LLC dba JOHNSON UTILITIES COMPANY, an Arizona limited liability company; THE CLUB AT OASIS, LLC, an Arizona limited liability company, *Plaintiffs/Appellants/Cross-Appellees,*

v.

SWING FIRST GOLF, LLC, an Arizona limited liability company, *Defendant/Appellee/Cross-Appellant,*

DAVID ASHTON, *Defendant/Appellee.*

No. 1 CA-CV 13-0625
FILED 8-27-2015

Appeal from the Superior Court in Maricopa County
No. CV2008-000141
The Honorable John Christian Rea, Judge

AFFIRMED

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MEMORANDUM DECISION

Judge Maurice Portley delivered the decision of the Court, in which Presiding Judge Andrew W. Gould and Judge Jon W. Thompson joined.

P O R T L E Y, Judge:

¶1 Johnson Utilities, LLC ("Utility") and The Club at Oasis, LLC ("Oasis") (collectively "Utility/Oasis") challenge the jury verdicts and resulting judgment in favor of Swing First Golf, LLC ("SFG"). The appellants argue: (1) the court, and jury, lacked jurisdiction to decide SFG's breach of tariff contract claim; (2) the court erred in denying its motion for directed verdict at the close of both trials, and in denying Utility's Arizona Rule of Civil Procedure ("Rule") 50 motion at the conclusion of the second trial; (3) the court erred by submitting SFG's quantum meruit claim to the jury; (4) the court erred in admitting impermissible and prejudicial evidence; and (5) the court abused its discretion in awarding attorneys' fees and costs to SFG. And on its cross-appeal, SFG argues the court erred in granting summary judgment to Utility and dismissing SFG's breach of the covenant of good faith and fair dealing claim. For the following reasons, we affirm the judgment.

FACTS[1] AND PROCEDURAL HISTORY

¶2 Utility is a water utility company in the San Tan Valley. Oasis owns a golf course, and is owned by George Johnson, the president and majority owner of Utility. SFG purchased a golf course in 2004 from

[1] We review the evidence in the light most favorable to sustain the verdict and judgment. *Hutcherson v. City of Phoenix*, 192 Ariz. 51, 53, 961 P.2d 449, 451 (1998) (citations omitted).

Johnson Ranch Holdings[2] and watered the course with water provided by Utility.[3]

¶3 Two years after SFG purchased the golf course, George Johnson and David Ashton, SFG's manager, discussed a plan for SFG to manage the Oasis golf course and, in return for SFG's management services, Johnson proposed to pay SFG with water credits provided by Utility. Ashton drafted a letter of understanding ("Oasis Agreement") outlining the scope of SFG's management services and confirming that Utility would provide water credits to pay for those services.[4] Ashton and Johnson shook hands in Johnson's office to confirm the agreement. SFG then began to manage Oasis, and Utility provided the agreed-upon water credits. Specifically, Utility supplied SFG with irrigation water for its golf course each month and sent a monthly invoice. SFG did not pay the invoice, and the following month's invoice did not show any balance due.

¶4 SFG managed Oasis for six months. SFG had not anticipated that Johnson would fire the Oasis staff as SFG began managing the golf course and that it would also be responsible for being the golf course's caretaker. As a result, and after training a new on-site manager, SFG resigned in November 2006. The following month, after changing SFG's accounts for the CAP water and effluent, Utility sent new invoices to SFG for the irrigation water that had been delivered and credited to SFG under the Oasis Agreement. The invoices reflected that Utility had raised SFG's rates for effluent from $0.62 per thousand gallons, the rate approved by the

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[2] Johnson Ranch Holdings ("JRH") had a Utilities Services Agreement with Utility for water services. Although JRH did not, as part of the golf course sale, assign its rights under the agreement to SFG, SFG argued during the first trial that the parties adopted the agreement. However, the court found the Utilities Services Agreement was a discriminatory contract and held that it was "illegal and against public policy" because the agreement provided a benefit to one of Utility's customers without providing that same benefit to its other customers.

[3] Utility initially provided untreated water from the nearby Central Arizona Project canal ("CAP water"). The parties, however, understood and agreed that Utility would provide treated wastewater ("effluent") to SFG for irrigation upon completion of the wastewater treatment plant, and Utility eventually delivered effluent water.

[4] During the first trial, the court held the Oasis Agreement to be unenforceable, and granted Utility's motion for summary judgment in part and dismissed SFG's breach of contract (Oasis Agreement) claim.

Arizona Corporation Commission ("ACC"), to $0.83 per thousand gallons, and raised the CAP water rate from $0.82 per thousand gallons, the ACC tariff rate, to $3.75 per thousand gallons. SFG paid for the water received at the tariff rate.

¶5 Additionally, SFG was not paid for its management services. Moreover, Utility began withholding effluent and, through the end of 2007, delivered almost exclusively the more expensive CAP water to SFG, and billed SFG at the rates above the ACC-approved rates. Utility also turned off SFG's irrigation water in November 2007 claiming that SFG owed about $215,000. SFG filed an informal complaint with the ACC and Utility restored SFG's irrigation service. Then seeking to prevent further service disruption, SFG filed a formal complaint with the ACC. Utility then resumed sending SFG effluent; in fact, Utility once delivered so much effluent that the golf course lake flooded much of the 18th-hole fairway.

¶6 Utility sued SFG and Ashton in January 2008 for failure to pay its water bills and for defamation.[5] In response, SFG answered and filed a thirteen-count counterclaim, including multiple breach of contract claims, quantum meruit, specific performance, negligence and a number of tort claims.[6] After discovery, voluntary dismissals and pretrial motions, including summary judgment for Utility on SFG's bad faith claim, the only claims remaining for trial were the breach of contract claims, SFG's claims for trespass and negligence related to the golf-course flooding, its quantum meruit claim, and defamation claim.

¶7 The dispute was tried in March 2012. The jury's verdicts were as follows: (1) SFG owed Utility $151,156 for breach of contract; (2) Utility owed SFG $1,000,000 for breach of contract; (3) Oasis owed SFG $54,600 on the quantum meruit claim related to the Oasis Agreement; (4) Ashton was awarded $10,000 for compensatory damages and $10,000 as punitive damages for defamation; and (5) Utility was negligent and committed

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[5] Specifically, Utility alleged: (1) breach of contract (Utility Service Agreement); (2) breach of the covenant of good faith and fair dealing; (3) tortious interference; and (4) defamation (as to SFG and Ashton).

[6] SFG's counterclaims included: (1) breach of contract – Utility Service Agreement; (2) breach of contract – Oasis Agreement; (3) quantum meruit; (4) unjust enrichment; (5) breach of contract – tariff rate schedule; (6) breach of covenant of fair dealing; (7) specific performance; (8) negligence; (9) trespass to land; (10) interference with a business relationship; (11) defamation; (12) unlawful use of monopoly power; and (13) racketeering.

trespass by over-delivering effluent and flooding the golf course, but no damages were awarded.[7] Utility/Oasis filed a motion for a new trial and the court granted the motion, vacated the verdicts on the contract claims and ordered a new trial on those claims.

¶8 The parties then tried the breach of contract issues. After considering the evidence, argument and instructions, the jury only found for SFG on its breach of contract claim and awarded it $41,883.11. The court considered SFG's request for attorneys' fees, and in the final judgment awarded SFG $300,737.25 in attorneys' fees.

¶9 Utility/Oasis then appealed the quantum meruit verdict from the first trial, the breach of contract verdict from the second trial, and SFG's award of attorneys' fees. SFG filed a cross-appeal. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(A)(1)[8] and Arizona Rule of Civil Appellate Procedure 8(a).

DISCUSSION

I. UTILITY/OASIS'S APPEAL

¶10 In challenging the verdicts in favor of SFG on its quantum meruit and breach of tariff contract claims, Utility/Oasis asks that we enter judgment in its favor, or alternatively, for a new trial to correct alleged evidentiary errors. Utility/Oasis also seeks a reduction in SFG's attorneys' fees.

A. Subject Matter Jurisdiction

¶11 Utility/Oasis argues that the trial court and, as a result, the jury, lacked jurisdiction to decide SFG's breach of tariff contract claim because the ACC has exclusive jurisdiction over utility regulation.[9] Subject matter jurisdiction is a question of law we review de novo. *State v. Dixon*, 231 Ariz. 319, 320, ¶ 3, 294 P.2d 157, 158 (App. 2013) (citation omitted).

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[7] Utility/Oasis does not appeal the defamation verdict and SFG does not appeal the verdict on its negligence and trespass claims.

[8] We cite the current version of the statute unless otherwise noted.

[9] Utility/Oasis filed a petition for special action asking this court to review the superior court's denial of its motion to dismiss based on lack of subject matter jurisdiction. We denied the request for stay and declined to take special action jurisdiction.

¶12 "Subject matter jurisdiction is the power to hear and determine cases of the general class to which the particular proceedings belong," *In re Marriage of Dorman*, 198 Ariz. 298, 301, ¶ 7, 9 P.3d 329, 332 (App. 2000) (quoting *Estes v. Superior Court*, 137 Ariz. 515, 517, 672 P.2d 180, 182 (1983)) (internal quotation marks omitted), and is conferred by our constitution or statutes, *State v. Maldonado*, 223 Ariz. 309, 311, ¶ 14, 223 P.3d 653, 655 (2010). Subject matter jurisdiction cannot be vested in a court solely by waiver or estoppel. *Guminski v. Ariz. State Veterinary Med. Examining Bd.*, 201 Ariz. 180, 184, ¶ 18, 33 P.3d 514, 518 (App. 2001).

¶13 Disputes involving whether a contract is enforceable or breached, even when one party is a utility, is left to the exclusive jurisdiction of Arizona courts. *See* Ariz. Const. art. 6, § 1; *General Cable Corp. v. Citizens Utilities Co.*, 27 Ariz. App. 381, 386, 555 P.2d 350, 355 (1976) ("We agree with the trial court that the construction and interpretation to be given to legal rights under a contract reside solely with the courts . . . ."); *see, e.g., Nelson v. Rice*, 198 Ariz. 563, 567, ¶ 13, 12 P.3d 238, 242 (App. 2000) (noting that the trial court has to determine whether a contract is unconscionable as a matter of law). In fact, more than fifty years ago our supreme court stated that: "No judicial power is vested in or can be exercised by the corporation commission unless that power is expressly granted by the constitution." *Trico Elec. Coop. v. Ralston*, 67 Ariz. 358, 363, 196 P.2d 470, 473 (1948). And although the ACC has broad jurisdiction over "public service corporations" pursuant to Article 15 of the Arizona Constitution, the provision does not give the ACC jurisdiction to entertain and resolve contract claims. *See Trico*, 67 Ariz. at 362-65, 196 P.2d at 472-74 (comparing Arizona Constitution Article 15 to Article 6, and concluding that the Constitution vested no jurisdiction in the ACC to construe contracts and determine their validity); *see, e.g., Ariz. Corp. Comm'n v. Tucson Gas, Elec. Light & Power Co.*, 67 Ariz. 12, 189 P.2d 907 (1948).

¶14 Utility/Oasis, however, contends that the ACC has exclusive jurisdiction in this case because SFG's contract claim is not based on an enforceable contract. We disagree. This is not a case about setting water rates. Instead, Utility elected to sue SFG in the Maricopa County Superior Court for breach of contract and related legal theories for failing to pay its water bill, including the water that SFG received while it provided management services at the Oasis golf course. The fact that Utility/Oasis was unsuccessful given the totality of the evidence, does not wrest subject matter jurisdiction from the court.

¶15 Moreover, even though one of SFG's claims against Utility involved whether Utility had billed SFG, its customer, above the rates

approved by the ACC, the court had subject matter jurisdiction to resolve the contract dispute. *See Sommer v. Mountain States Tel. & Tel. Co.*, 21 Ariz. App. 385, 387-88, 519 P.2d 874, 876-77 (1974). Therefore, the superior court had subject matter jurisdiction to resolve the dispute between Utility and its customer. *See Trico*, 67 Ariz. at 365, 196 P.2d at 474; *see also General Cable*, 27 Ariz. App. at 386, 555 P.2d at 355 (concluding that the ACC cannot construe and interpret the parties' rights under a contract, even if that contract had been specifically approved by the ACC).

¶16 Utility/Oasis also contends the jury had to decide water utility policy, even though the ACC has sole and exclusive jurisdiction. We disagree with the argument.

¶17 Neither jury in either trial was asked to decide water utility regulation policy. Instead, the jury in the second trial had to decide whether SFG or Utility breached any contracts and, if so, to decide damages. Because the jury was not asked to resolve water utility regulation policy or rates, and did not, the superior court was not divested of subject matter jurisdiction over this lawsuit.

B. Breach of Tariff Contract Claim

¶18 Utility/Oasis next asserts that the superior court erred in denying its motion for directed verdict[10] at the close of both trials, and in denying its Rule 50(b) post-judgment motion for judgment as a matter of law after the second trial. Utility/Oasis asserts that SFG failed to present any evidence to support its breach of tariff contract claim.

¶19 We review the court's ruling on a motion for directed verdict and a motion for judgment as a matter of law de novo. *Felder v. Physiotherapy Assocs.*, 215 Ariz. 154, 162, ¶ 36, 158 P.3d 877, 885 (App. 2007); *Warne Invs., Ltd. v. Higgins*, 219 Ariz. 186, 194, ¶ 33, 195 P.3d 645, 653 (App. 2008). We will affirm the ruling unless, like a motion for summary judgment, "the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the

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[10] Utility/Oasis did not provide the transcript from the first trial. As a result, we presume that the record would support the court's ruling. *Baker v. Baker*, 183 Ariz. 70, 73, 900 P.2d 764, 767 (App. 1995). Consequently, the superior court did not err by denying the motion for directed verdict in the first trial. *See id.*

proponent of the claim or defense." *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990); *see* Ariz. R. Civ. P. 50(a).

¶20 To prevail on its breach of contract claim, SFG was required to prove it had a contract with Utility, Utility breached the contract, and SFG suffered resulting damages. *See Goodman v. Physical Res. Eng'g, Inc.*, 229 Ariz. 25, 28, ¶ 7, 270 P.3d 852, 855 (App. 2011). Utility does not dispute the existence of a contract – it provided irrigation water to SFG for a fee. Instead, Utility argues that SFG claimed that it had a right to effluent for its irrigation water, but failed to prove a contractual right to effluent instead of CAP water. The record belies the focus of the argument.

¶21 SFG presented evidence to the jury that Utility breached its tariff contract by: (1) overcharging SFG for deliveries of both CAP water and effluent; (2) withholding effluent; (3) improperly charging for minimum bills; (4) over-delivering irrigation water resulting in flooding of the golf course; (5) manufacturing bills; (6) using a manufactured account balance as a pretext to discontinue service; (7) failing to follow Arizona Administrative code regulations; and (8) not providing appropriate credits for overcharges. And citing to A.R.S. § 47-2306(B), SFG also claimed that Utility breached its contracts by failing to use its best efforts to deliver effluent to SFG.

¶22 Because the water rates that Utility can charge its customers for CAP water and effluent are set by the ACC, the approved tariffs constitute an enforceable contract between Utility and its customer, SFG. *See Sommer*, 21 Ariz. App. at 387-88, 519 P.2d at 876-77. SFG presented evidence that Utility breached the contract. SFG also presented evidence that it was damaged as a result of Utility's breach and the amount of those damages, including the amount SFG overpaid between November 2006 and December 2007.

¶23 The jury heard the testimony. The jury had to determine the credibility of the witnesses, evaluate the exhibits and determine the facts in reaching its verdict. *See Logerquist v. McVey*, 196 Ariz. 470, 488, ¶ 52, 1 P.3d 113, 131 (2000). The jury fulfilled its role, found that Utility had breached the tariff rates, and awarded SFG $41,883.11 in damages. Because substantial evidence supported the jury's breach of tariff contract verdict, we find no error.

C. Quantum Meruit Claim

¶24 Utility/Oasis argues that the superior court erred in the first trial by submitting SFG's quantum meruit claim to the jury because the claim was based on an illegal contract. We disagree.

¶25 "Quantum meruit" is the measure of damages imposed when a party prevails on the equitable claim of unjust enrichment. *W. Corr. Grp., Inc. v. Tierney*, 208 Ariz. 583, 590, ¶ 27, 96 P.3d 1070, 1077 (App. 2004) (citing *Landi v. Arkules*, 172 Ariz. 126, 135, 835 P.2d 458, 467 (App. 1992)). To recover quantum meruit damages, a plaintiff must prove "the defendant received a benefit, that by receipt of that benefit the defendant was unjustly enriched at the plaintiff's expense, and that the circumstances were such that in good conscience the defendant should provide compensation." *Freeman v. Sorchych*, 226 Ariz. 242, 251, ¶ 27, 245 P.3d 927, 936 (App. 2011).

¶26 Utility/Oasis contends, however, that SFG cannot recover damages under its quantum meruit theory because the court found the Oasis Agreement to be unenforceable and against public policy. Although the agreement was unenforceable, quantum meruit damages can be awarded when one party has performed in return for a promise that turns out to be unenforceable on public policy grounds. *See Blue Ridge Sewer Improvement Dist. v. Lowry and Assocs., Inc.*, 149 Ariz. 373, 375, 718 P.2d 1026, 1028 (App. 1986) (noting that a plaintiff may recover under quantum meruit despite the possible illegality of the underlying contract); *Pelletier v. Johnson*, 188 Ariz. 478, 937 P.2d 668 (App. 1996) (allowing a seller to recover on a quantum meruit claim against the buyer even though the contract was illegal under Arizona law); *see also* Restatement (Second) of Contracts § 198 cmt. b (1981) (claimant entitled to restitution for performance under a contract determined to be against public policy where "the public policy is intended to protect persons of the class to which he belongs and, as a member of that protected class, he is regarded as less culpable."); *see also* Restatement (Third) of Restitution and Unjust Enrichment § 32 (2011).

¶27 Here, SFG provided golf course management services for six months to Oasis pursuant to an agreement made between SFG and Johnson, the owner of Oasis and Utility. Johnson, on behalf of Utility, agreed that Utility would provide water credits to SFG in exchange for SFG's management services. The superior court found the Oasis Agreement unenforceable and against public policy because "[a] public utility must treat all customers without discrimination." The court, as a result, dismissed SFG's breach of Oasis Agreement claim, but allowed the jury to decide whether SFG was entitled to damages under its quantum meruit

claim. Because there were facts supporting the equitable quantum meruit claim and damages, the court did not err by allowing the jury to decide whether SFG was entitled to quantum meruit damages despite the illegality of the Oasis Agreement.

¶28 Utility/Oasis also claims the superior court erred in denying its request in the first trial for a non-uniform quantum meruit jury instruction. We review de novo whether jury instructions correctly state the law. *State v. Torres*, 233 Ariz. 479, 481, 314 P.3d 825, 827 (App. 2013). We review jury instructions as a whole to determine whether the jury was properly guided in its deliberations. *See Terry v. Gaslight Square Assocs.*, 182 Ariz. 365, 368, 897 P.2d 667, 670 (App. 1994).

¶29 During the first trial, Utility/Oasis requested the following non-uniform jury instructions:

> A party may not recover on an unjust enrichment claim where the claimed amount is simply the amount allegedly due on a contract.
>
> Where a contract is alleged, a party has no claim for unjust enrichment.
>
> An innocent party to an illegal contract may only seek restitution under the contract if a public interest is not threatened.

The court rejected the requested instruction, and gave the following:

> **Quantum Meruit**[11]
>
> Swing First is entitled to recover the reasonable value of the services rendered to Oasis unless you find that either one of two things was true in this case:
>
> First, Swing First is not entitled to recover for his services if it was understood by Swing First and Oasis that the services were being rendered free of charge. It is Oasis' burden to show that the parties had such an understanding.

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[11] This is the Revised Arizona Jury Instruction for Quantum Meruit. *See* Rev. Ariz. Jury Instr. (Civil) Contract 24 (5th ed. 2013).

> Second, Swing First may not recover for his services if you find that, under all the circumstances, it was not unfair for Oasis to receive the benefit of Swing First's services without paying for them.
>
> Unless you find that Swing First and Oasis understood that the services were being rendered free of charge, or that under all the circumstances it was not unfair for Oasis to receive the benefit of those services without paying for them, you should award Swing First the reasonable value of the services. In determining what the reasonable value of Swing First's services was, you may consider the nature of the services provided and the customary rate of pay for such services.

The instruction the court gave was not a misstatement of the law but reflected the current state of the law. And viewing the instruction with the other instructions in this case, the jury was not misled by the instruction and, as a result, we find no error. *See Blue Ridge*, 149 Ariz. at 375, 718 P.2d at 1028.

¶30 Utility/Oasis's last challenge to the quantum meruit verdict is based on *In re Estate of Newman*, and Utility/Oasis contends that the claim should have been decided by the judge rather than the jury because it is purely an equitable claim. 219 Ariz. 260, 274, ¶ 55, 196 P.2d 863, 877 (App. 2008). In *Newman*, a probate matter, we stated that there is no constitutional right to a jury trial for equitable claims, including breach of fiduciary duty relating to a trustee's duties in probate proceedings. *Id.* at 273-74, ¶¶ 53, 57, 196 P.3d at 876-77; *see Henry v. Mayer*, 6 Ariz. 103, 114, 53 P. 590, 593 (Ariz. Terr. 1898) ("[T]he cause being one of equitable jurisdiction, the court below was not bound to submit any issue of fact to a jury[.]"). This case, however, is not a probate action. Instead, it was a contract and tort dispute that was whittled down to just the equitable claim against Oasis after the verdicts in the first trial and the court's grant of the motion for new trial. Moreover, Arizona Rule of Civil Procedure 39(m) provides:

> In all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury or, the court, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.

And "even in equity cases, where a jury has been demanded, the court may not withdraw the case from the jury's consideration if there are

controverted issues of fact." *Jones v. CPR Div., Upjohn Co.*, 120 Ariz. 147, 150, 584 P.2d 611, 614 (App. 1978) (internal citation and quotation marks omitted). Although the quantum meruit claim is an equitable claim, the jury had to resolve diverse factual questions to determine if SFG was entitled to any damages under the theory. *See id.* Consequently, the court properly allowed the jury to decide the issue after properly instructing the jury; we find no error.

D. Evidentiary Rulings

¶31 Utility/Oasis asserts that the court's erroneous evidentiary rulings in both trials prejudiced Utility/Oasis and precluded a fair trial. We will not disturb the trial court's rulings regarding the exclusion or admission of evidence unless there is a clear abuse of discretion and prejudice results. *Larsen v. Decker*, 196 Ariz. 239, 241, ¶ 6, 995 P.2d 281, 283 (App. 2000) (citations omitted).

¶32 First, Utility/Oasis argues that the court erred in admitting the unsigned Oasis Agreement in the first trial because it was an illegal contract. As discussed in ¶ 26, *supra*, Arizona law allows the remedy of quantum meruit for an innocent party who has provided benefits under an illegal contract. *See* Restatement (Third) of Restitution and Unjust Enrichment § 32 (1981); *Blue Ridge*, 149 Ariz. at 375, 718 P.2d at 1028. The court did not abuse its discretion by admitting the Oasis Agreement. The agreement was relevant to show the meeting of the minds, the parties' understanding of the scope of work, and the expected cost for SFG's management services.

¶33 Utility/Oasis next contends that the admission of evidence relating to the management of the Oasis golf course in the second trial was prejudicial and precluded a fair trial. Although the Oasis Agreement was not directly relevant to the contract claims being litigated in the second trial, Utility asked Ashton questions about SFG's payment history. On redirect, the court allowed Ashton to testify to a limited extent and explain why SFG did not make payments on its water accounts during the time it provided management services to Oasis. *See Elia v. Pifer*, 194 Ariz. 74, 79, 977 P.2d 796, 801 (App. 1998) ("[A] party will not be allowed to complain of the introduction of irrelevant evidence where he has asserted a position that makes such evidence relevant.") (citing Morris K. Udall et. al, *Law of Evidence* § 11, at 11 (3d ed. 1991)).

¶34 Moreover, the court instructed the jury before the final jury instructions to disregard any testimony about the alleged Oasis Agreement

involving SFG and the management of another golf course because it had no bearing on the issues in the case. Therefore, even if Utility had not opened the door to allow Ashton's redirect testimony, the court's limiting instruction cured any potential error. *See Jimenez v. Starkey*, 85 Ariz. 194, 196, 335 P.2d 83, 84 (1959) (when superior court properly instructs jury, an appellate court "must presume that the jury obeyed such instructions"); *Hyatt Regency Phoenix Hotel Co. v. Winston & Strawn*, 184 Ariz. 120, 140, 907 P.2d 506, 526 (App. 1995) ("We must assume on review that the jury followed the instructions of the trial court.").

¶35 Utility also contends the court erred in allowing the jury to hear testimony about the Utility Services Agreement. During Ashton's testimony in the second trial, a juror submitted the following question:

> Was there ever anything in writing, such as a contract, that says you were only to get effluent from Johnson Utilities?

Utility objected to be question because the Utility Services Agreement had been determined to be an illegal contract in the first trial and any affirmative answer would "completely open[] up the door to lots of issues that have been thrown out already in this case." The objection was overruled, and Ashton answered "Yes, there was." Utility/Oasis argues that Ashton's answer caused it substantial prejudice and affected the jury's verdict. We disagree. Both parties were given the opportunity to ask Ashton any follow-up questions to clarify his answer to the question. Moreover, the court, as noted in ¶ 34, *supra*, gave a limiting instruction telling the jury to "disregard any testimony regarding any other golf course in reaching your decision in this case." Finally, neither party mentioned the Utility Services Agreement in closing arguments. Consequently, given the answer to the one question and the limiting instruction, the court did not err by allowing Ashton to answer the juror's question.

¶36 Finally, Utility/Oasis argues that the court abused its discretion by refusing to admit additional attachments to a letter Brian Tompsett, Utility's Executive Vice President, sent to Ashton (Exhibit 8). Utility/Oasis, however, does not cite to any legal authority supporting its argument.

¶37 During the first trial, Utility offered Exhibit 22 that had the Tompsett letter as well as additional attachments, and it was admitted. In the second trial, SFG offered Exhibit 8, which included the Tompsett letter, but omitted 83 pages of the attached invoices from Exhibit 22. Utility argued that Exhibit 8 was incomplete and moved to admit the 83 pages of

additional attachments to the Tompsett letter.[12] SFG objected because the 83-page document had not been disclosed nor provided before trial, and the court sustained the objection. Because the trial court is the gate-keeper to ensure that exhibits have been disclosed, *see* Arizona Rule of Civil Procedure 26.1, *see, e.g., Lohmeier v. Hammer*, 214 Ariz. 57, 66, ¶ 32, 148 P.3d 101, 110 (App. 2006) (noting a trial court must serve as an evidentiary gatekeeper), the court did not abuse its discretion by admitting Exhibit 8 and precluding Utility's undisclosed additional attachments.

E. Prejudgment Interest

¶38 Utility/Oasis claims that the court erred by awarding SFG prejudgment interest on its quantum meruit claim. Whether a party is entitled to prejudgment interest is a question of law we review de novo. *Berry v. 352 E. Virginia, L.L.C.*, 228 Ariz. 9, 13, ¶ 18, 261 P.3d 784, 788 (App. 2011); *Alta Vista Plaza, Ltd. v. Insulation Specialists Co.*, 186 Ariz. 81, 82, 919 P.2d 176, 177 (App. 1995).

¶39 Oasis asserts that SFG was not entitled to prejudgment interest on its quantum meruit claim because the claim was not liquidated. Prejudgment interest is awarded as a matter of right on a liquidated claim. *Alta Vista*, 186 Ariz. at 82-83, 919 P.2d at 177-78. A claim is liquidated if there is credible data from which a precise amount of damages can be calculated without reliance on opinion or discretion. *Id.; see also John C. Lincoln Hosp. & Health Corp. v. Maricopa Cnty.*, 208 Ariz. 532, 544, ¶ 39, 96 P.3d 530, 542 (App. 2004) ("A claim is liquidated if the plaintiff provides a basis for precisely calculating the amounts owed.").

¶40 Here, the court awarded prejudgment interest on SFG's quantum meruit damages from November 1, 2006, the date SFG resigned from managing Oasis, to the date of the judgment. The record establishes that the reasonable value of the management services SFG provided to Oasis was ascertainable by accepted standards of valuation and the jury determined the value of those services. SFG managed the Oasis golf course for six months according to the terms of the Oasis Agreement. And the agreement provided that Utility would provide to SFG as payment for its services water credits to 150 million gallons of irrigation per year. Although that agreement was unenforceable, it was some evidence of the value SFG was to receive for its management services. Given the agreement, the value of the management services were ascertainable by reasonable calculation

[12] The additional attachments were marked as Exhibit 42. The exhibit is not contained in the record on appeal.

after SFG resigned, and as the jury determined after reviewing the agreement and relevant exhibits. Accordingly, the court did not err by awarding SFG prejudgment interest on the value of its management services from the date it resigned. *See Alta Vista*, 186 Ariz. at 82-83, 919 P.2d at 177-78.

F. Attorneys' Fees

¶41 Utility/Oasis contends that the court erred by awarding SFG its attorneys' fees. We review the award, including the amount, for an abuse of discretion. *Assyia v. State Farm Mut. Auto. Ins. Co.*, 229 Ariz. 216, 222, ¶ 25, 273 P.3d 668, 674 (App. 2012). We consider whether "a judicial mind, in view of the law and circumstances, could have made the ruling without exceeding the bounds of reason." *Associated Indem. Corp. v. Warner*, 143 Ariz. 567, 571, 694 P.2d 1181, 1185 (1985) (citation omitted). But, the application of A.R.S. § 12-341.01(A) is a question of law we review de novo. *Nolan v. Starlight Pines Homeowners Ass'n*, 216 Ariz. 482, 490, 167 P.3d 1277, 1285 (App. 2007).

¶42 After two trials, Utility did not prevail on its lawsuit, but SFG was awarded damages against Utility/Oasis for quantum meruit and breach of the tariff contract; the total exceeding $95,000. In ruling on competing requests for attorneys' fees, the court denied Utility's request, found that SFG was the prevailing party and, after deducting the fees associated with the non-contract claims and unsuccessful claims, awarded SFG $300,737.25 in attorneys' fees.

¶43 Utility/Oasis asserts that the court erred by awarding SFG fees for the breach of tariff contract and quantum meruit because those claims were not "actions arising under contract." *See* A.R.S. § 12-341.01(A) ("In any contested action arising out of a contract, express or implied, the court may award the successful party reasonable attorney fees."). We disagree. As discussed above in ¶ 15, *supra*, SFG's breach of tariff contract counterclaim arose because it was a customer of Utility and Utility unlawfully billed it above the rates set by the ACC for CAP water and effluent. *See Sommer*, 21 Ariz. App. at 387-88, 519 P.2d at 876-77. Moreover, a party prevailing on a quantum meruit claim may recover attorneys' fees under A.R.S. § 12-341.01(A). *See Pelletier*, 188 Ariz. at 482-83, 937 P.2d at 672-73. Therefore, the court did not abuse its discretion by awarding SFG its attorneys' fees associated with the two claims under A.R.S. § 12-341.01(A).

¶44 Utility also challenges the court's decision that SFG was the "successful party," and therefore eligible for an award of fees pursuant to A.R.S. § 12-341.01. Determining the "successful" party for the purposes of attorneys' fees is within the trial court's discretion and "will not be disturbed on appeal if any reasonable basis exists for it." *Vortex Corp. v. Denkewicz*, 235 Ariz. 551, 562, ¶ 39, 334 P.3d 734, 745 (App. 2014) (internal citation and quotation marks omitted); *see also Assyia*, 229 Ariz. at 223, 273 P.3d at 675 ("[T]he trial court has substantial discretion to determine who is a 'successful party.'") (internal citation omitted). Here, SFG was the "successful party" because it prevailed and received a monetary judgment and Utility/Oasis did not. *See Berry*, 228 Ariz. at 14, ¶ 24, 261 P.3d at 789 (finding that buyer was the successful party because it received a monetary judgment); *see also Ocean W. Contractors, Inc. v. Halec Constr. Co.*, 123 Ariz. 470, 473, 600 P.2d 1102, 1105 (1979) (monetary award not dispositive but "an important item to consider when deciding who, in fact, did prevail"). Although it did not prevail on all of its counterclaims or claims that were tried, SFG prevailed more than Utility/Oasis and the court did not abuse its discretion by finding that SFG was the successful party.

¶45 Finally, Utility/Oasis argues that the court abused its discretion by awarding SFG attorneys' fees because (1) SFG did not provide sufficient detail to determine the reasonableness of the fees sought, and (2) the fees were excessive. SFG's fee affidavit, as required, disclosed "the type of legal services provided, the date the service was provided, the attorney providing the service . . . and the time spent in providing the service." *See Schweiger v. China Doll Rest., Inc.*, 138 Ariz. 183, 188, 673 P.2d 927, 932 (App. 1983). The fee affidavit also provided "sufficient detail to enable the court to assess the reasonableness of the time incurred." *See id.*

¶46 Once a party establishes entitlement to fees and meets the minimum requirements in an application and affidavit, as SFG did here, the burden shifts to the party opposing the fee award to demonstrate the impropriety or unreasonableness of the requested fees. *Assyia*, 229 Ariz. at 223, ¶ 29, 273 P.3d at 675. The argument that $400 was an unreasonable hourly rate because SFG's counsel, Craig Marks, lacked sufficient litigation experience is not persuasive. *See State ex rel. Corbin v. Tocco*, 173 Ariz. 587, 594, 845 P.2d 513, 520 (App. 1992) (citing *State v. Maricopa Cnty. Med. Soc'y*, 578 F. Supp. 1262, 1264 (D. Ariz. 1984)) (opposing party cannot simply claim that the rates submitted are "too high"). SFG supported its fee request with an affidavit from counsel that documented Mr. Marks' experience and credentials, including more than 30 years' experience in utility law. SFG was entitled to retain competent, experienced counsel to represent it, and a commensurate hourly rate was not unreasonable. *See Assyia*, 229 Ariz. at

223, ¶ 30, 273 P.3d at 675. Therefore, finding no error, we affirm the court's award of SFG's attorneys' fees.

II. SFG'S CROSS-APPEAL

¶47 In its cross-appeal, SFG argues that the trial court erred in granting Utility's motion for summary judgment and dismissing SFG's claim that Utility tortiously breached the covenant of good faith and fair dealing. SFG seeks to reverse the court's ruling, and remand the claim for a jury trial. For the following reasons, we affirm.

¶48 SFG, as part of its claims against Utility, asserted a claim for breach of good faith and fair dealing as it related to Utility's alleged breach of contract. Specifically, SFG argued that Utility breached its duty of good faith by failing to make payment under the Oasis Agreement and by failing to abide by the ACC-mandated tariffs in providing water service. Utility moved for summary judgment, which included SFG's bad faith claim, the court granted the motion in part and dismissed the claim.[13] SFG filed a motion for reconsideration, which the court denied.

¶49 We review the grant of summary judgment de novo to determine "whether there are any genuine issues of material fact" and to determine whether the movant is entitled to judgment as a matter of law. *Unique Equip. Co. v. TRW Vehicle Safety Sys., Inc.*, 197 Ariz. 50, 52, ¶ 5, 3 P.3d 970, 972 (App. 1999). If "the evidence or inferences would permit a jury to resolve a material issue in favor of either party, summary judgment is improper." *Comerica Bank v. Mahmoodi*, 224 Ariz. 289, 292, ¶ 19, 229 P.3d 1031, 1034 (App. 2010) (internal citation and quotation marks omitted). We view the facts and reasonable inferences in the light most favorable to the

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[13] SFG argues that Utility's motion for summary judgment only requested that the court dismiss SFG's bad faith claim as to the Utility Services Agreement and the Oasis Agreement, but not as to the tariff contract. SFG contends, "the Court granted a motion that was not made and to which [SFG] did not respond." In its summary judgment motion, Utility claimed it was entitled to summary judgment on Count Six of SFG's First Amended Counterclaim, which alleged that Utility breached the covenant of good faith and fair dealing by breaching the terms of the Utility Service Agreement, the Oasis Agreement, and tariffs. The record, as a result, supports the court's ruling that the motion encompassed SFG's bad faith claim in its entirety.

party against whom judgment was entered. *Unique Equip. Co.*, 197 Ariz. at 52, ¶ 5, 3 P.3d at 972.

¶50 Tort damages for breach of the covenant of good faith and fair dealing are available only when there exists a "special relationship" between the parties, which is characterized by "'elements of public interest, adhesion, **and** fiduciary responsibility.'" *Rawlings v. Apodaca*, 151 Ariz. 149, 158, 726 P.2d 565, 574 (1986) (quoting *Seaman's Direct Buying Serv., Inc. v. Standard Oil Co. of Cal.*, 686 P.2d 1158, 1166 (Cal. 1984)) (emphasis added). Examples of the "special relationship" include the relationship between common carrier and passenger, innkeeper and guest, physician and patient, and attorney and client. *Rawlings*, 151 Ariz. at 159, 726 P.2d at 575. And as the superior court noted in its ruling, Arizona case law does not permit tort damages "based on the adhesive nature of the contract alone – the Supreme Court used 'and,' not 'or,' in listing the elements." *See id.* at 158, 726 P.2d at 574.

¶51 Here, SFG alleged the special relationship between the parties was based solely on the adhesive nature of the contract, and it did not allege any additional elements of public interest or fiduciary responsibility in its amended counterclaim. In its cross-appeal, SFG now argues that Utility's relationship with its customers is subject to the public interest and involved fiduciary elements. SFG did not raise the argument in response to the summary judgment motion, but only in its motion for reconsideration. The superior court did not reconsider its ruling, and we generally do not consider arguments raised for the first time in a motion for reconsideration. *See Evans Withycombe, Inc. v. W. Innovations, Inc.*, 215 Ariz. 237, 240, ¶ 15, 159 P.3d 547, 550 (App. 2006). Because we find no reason to consider an argument the court did not address, SFG failed to preserve its argument for appellate review.

III. ATTORNEYS' FEES AND COSTS ON APPEAL

¶52 Both parties have requested an award of attorneys' fees and costs upon appeal pursuant to A.R.S. § 12-341.01. Because Utility/Oasis has not prevailed, we deny the request. In the exercise of our discretion, we award SFG its reasonable attorneys' fees on appeal in an amount to be determined pursuant to A.R.S. § 12-341.01, as well as its costs on appeal upon compliance with Arizona Rule of Civil Appellate Procedure 21.

CONCLUSION

¶53 For the foregoing reasons, we affirm the court's judgment.

Ruth A. Willingham · Clerk of the Court
FILED: ama

ORIGINAL

Johnson Utilities

Exhibit B

Date: February 19, 2016

Arizona Corporation Commission
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2016 APR 19 P 3:06
AZ CORP COMMISSION
DOCKET CONTROL

Arizona Corporation Commission
Docket Control
1200 West Washington
Phoenix, AZ 85007-2996

RE: Docket # WS-02987A-16-0017
Johnson Utilities Response to Complaint #2016-129948

Dear Arizona Corporation Commission:

Notwithstanding Karen Christian's negative remarks about our opposing opinions to her past smear campaigns, she once again brings up those very same tiresome rants about those previous issues here in this unrelated docket. It would seem to me that in order to be more effective, she would stick to the issue at hand, the formal complaint of Swing First Golf ("SFG"). I am able to do that herein.

First point, and this was highlighted in the Procedural Conference held in this Docket on April 6, 2016, The Golf Club at Oasis has an agreement in place for which Johnson Utilities has obligations to deliver effluent whereas SFG does not have an agreement in place. There are also ten (10) recharge ponds constructed at the Club at Oasis for the sole purpose of recharging wastewater effluent. Tremendous difference between the two entities.

The Poston Butte Golf Course and the Encanterra Golf Course, the other two golf courses in the San Tan Valley, both have agreements with Johnson Utilities to either take effluent or obligate Johnson Utilities to deliver effluent. If effluent was such an important issue for SFG, why does not an agreement exist for that course? It would seem prudent that a golf course would want to ensure a supply of effluent or water to meet their irrigation needs. The answer may lay in the fact that the course has not always taken effluent. Prior to 2006 and a few years between then and now, the course has also used either CAP surface water or groundwater for its irrigation needs.

In Decision No. 73521, the Commission approved Johnson's non-potable water tariff. The same water being delivered to SFG now. The Order specifically provides approval for, and only for, the delivery of non-potable water for a particular non-profit homeowner's association and SFG. Even if it desired to, Johnson Utilities could not provide non-potable water to those other golf courses in the San Tan Valley. The Johnson Utilities tariffs strictly prohibits it.

The whole second page of Ms. Christian's letter to the Docket is nothing but unrelated Johnson bashing and not worth commenting on in this Docket. So, I will end by mirroring Johnson Utilities' motion to dismiss this complaint in the Docket on the grounds that (i) SFG's claims are barred by the doctrine *res judicata*, and (ii) SFG's claims should be dismissed because the Commission lacks jurisdiction to direct how Johnson Utilities uses effluent.

Sincerely,

Brad Cole
Chief Operating Officer

Exhibit C

Craig Marks

From: Bradley Cole <BCole@azvision.net>
Sent: Monday, January 11, 2016 4:52 PM
To: Craig Marks
Subject: RE: Johnson Ranch
Attachments: Swing First Golf Course Class A Plus Agreement.pdf

Craig,

Attached is the end-user agreement for Swing First. It has been adjusted up to 390 AF/YR. Please have your client sign it and return to us by tomorrow, Tuesday, January 12. Thanks.

Brad Cole
Chief Operating Officer
Johnson Utilities
5230 E. Shea Boulevard, Suite 200
Scottsdale, AZ 85254
(480) 998-3300

From: Craig Marks [mailto:Craig.Marks@azbar.org]
Sent: Monday, January 11, 2016 4:34 PM
To: Bradley Cole <BCole@azvision.net>
Subject: FW: Johnson Ranch

Brad,

Here are Swing First's consumption figures.

Craig

MONTH	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016
January	16.8	9.24	14	2	14	13	11.9	13.99	9.07	
February	11.11	6.15	12.32	12.95	10.24	16.65	9.9	12.76	11.4	
March	24.98	33.55	29.28	13.69	29.38	25.73	20.85	11.32	24.11	
April	57.51	44.25	43.03	41.84	35.24	39.48	34.29	39.64	34.93	
May	57.51	49.98	50.01	44.31	57.39	53.79	43.13	45.49	30.66	
June	92.07	57.6	44.72	45.79	54.64	59.07	67.87	60.4	49.87	
July	64.01	55.61	47.51	45.91	52.38	41.45	41.57	58.52	51.97	
August	64.9	51.49	44.6	42.28	52.26	44.97	46.96	45.66	46.3	
September	52.89	48.34	37.84	48.71	48.97	41.3	33	0	28.97	
October	47.38	38.58	48.31	41.32	44.91	36.72	57.67	14.59	36.71	
November	28.16	27.53	30.7	28.19	17.44	36.73	24.03	17.45	17.85	
December	7.35	6.6	15.76	11.1	16.49	12.44	14.77	10.36	9.12	

TOTAL	524.68	428.92	418.08	388.09	421.33	421.33	405.94	330.18	350.96	
C.A.P.	208.6	23.2	0	0	0	0	14.97	70		

Exhibit C Attachment

Johnson Utilities, L.L.C
968 E. Hunt Highway
Queen Creek, AZ 85242
Phone: 480-987-9870

CLASS A+ RECLAIMED WATER AGREEMENT

Application Date: _____ Effective Date: _____

Account Number: 00120362-02	Location Name:
Name: Swing First Golf, LLC	Legal Description:
SS (if individual):	Tax Parcel No. 210-19-0670
Title:	Latitude: Longitude:
Company:	Type of Reuse: A+
Address: 30761 N Golf Club Dr	Service Address: 30761 N Golf Club Dr
City: San Tan Valley State: AZ Zip: 85143	City: San Tan Valley State: AZ Zip: 85143
Meter No.: 74923868 Size: 8" Reading:	Estimated Usage: 390 AF/Yr

AGREEMENT

I/WE HEREBY APPLY FOR CLASS A+ RECLAIMED WATER SERVICE AT THE LOCATION ABOVE UNDER THE TERMS AND CONDITIONS AS APPROVED BY THE ARIZONA CORPORATION COMMISSION, ARIZONA DEPARTMENT OF ENVIRONMENTAL QULAITY, AND AGREE TO THE FOLLOWING:

Effluent Sales

1. All Size Meters	On a per 1,000 gallon basis	Per Tariff
2. All Size Meters	On a per acre-foot basis	Per Tariff

Irrigating with Reclaimed Water [A.C.C. R18-9-704(F)]

1. Use application methods that reasonably preclude human contact with reclaimed water;
2. Prevent reclaimed water from standing on open access areas during normal periods of use;
3. Prevent reclaimed water from coming into contact with drinking fountains, water coolers, or eating areas; and
4. Secure hose bibbs discharging reclaimed water to prevent use by the public.

Prohibited activities [A.C.C. R18-9-704(G)]

1. Irrigating with untreated sewage;
2. Providing or using reclaimed water for any of the following activities:
   a. Direct reuse for human consumption;
   b. Direct reuse for swimming, wind surfing, water skiing, or other full-immersion water activity with a potential of ingestion; or
   c. Direct reuse for evaporative cooling or misting.
3. Misapplying reclaimed water for any of the following reasons:
   a. Application of a stated class of reclaimed water that is of lesser quality than allowed by this Article for the type of direct reuse application;
   b. Application of reclaimed water to any area other than a direct reuse site; or
   c. Allowing runoff of reclaimed water or reclaimed water mixed with stormwater from a direct reuse site, except for agricultural return flow that is directed onto an adjacent field or returned to an open water conveyance.

Signage Requirements for Direct Reuse Sites [A.C.C. R18-9-704 (H)]

Reclaimed Water Class	Hose Bibbs	Residential Irrigation	Schoolground Irrigation	Other Open Access Irrigation	Restricted Access Irrigation	Mobile Reclaimed Water Dispersal
A+	Each bibb	Front yard, or all entrances to a subdivision if the signage is supplemented by written yearly notification to individual homeowners by the homeowner's association.	On premises visible to staff and students	None	None	Back of truck or on tank

BILLS ARE DUE WHEN RENDERED AND DELINQUENT FIFTEEN (15) DAYS THEREAFTER. AFTER THE DELINQUENT DATE THE COMPANY MAY, UPON THE (10) DAYS WRITTEN NOTICE, DISCONTINUE SERVICE ON THE DELINQUENT ACCOUNT. SERVICE WILL BE RESTORED ONLY AFTER ALL DUE BILLS ARE PAID IN FULL. RE-DEPOSIT MADE, IF REQUIRE, AND APPLICABLE SERVICE FEES AS SET FORTH IN THE APPROVED RATE SCHEDULE ARE PAID. IF AN UNPAID BILL IS PLACED FOR COLLECTION WITH AN AGENCY OR ATTORNEY, I/WE AGREE TO PAY REASONABLE COLLECTION AND/OR ATTORNEY FEES AND COSTS.

_____
Applicant Signature

Exhibit D

Craig Marks

From: Craig Marks <Craig.Marks@azbar.org>
Sent: Tuesday, January 12, 2016 8:53 AM
To: Bradley Cole (BCole@azvision.net)
Cc: Jeff Lundgren (jeff.lundgren@gmail.com)
Subject: Effluent Application
Attachments: 160111 Swing First Effluent Application

Brad,

I have attached the effluent application that you requested. For the record, Swing First has been an effluent customer of Johnson Utilities since March 2006. Johnson Utilities asked Swing First to execute a new Effluent Application in order to resolve Notice of Violation No. 159676, which required the Company to submit end-user agreements with existing effluent customers to ADEQ. As I discussed yesterday with you and George, the 390 AF annual estimated usage may not be enough in all years to irrigate Swing First's Johnson Ranch Golf Course. We would have preferred to have submitted effluent usage at 425 AF, but have accepted your offer yesterday that Swing First will submit the lower number but, notwithstanding that submission, Johnson Utilities will provide up to an additional 35 AF/year to Swing First as needed, provided that the effluent is used only to irrigate the golf course and not for other entities in the area.

This application is being submitted strictly in accordance with yesterday's agreement, as an accommodation to Johnson Utilities so that it may resolve NOV 159676, and with that this accommodation does not abridge or modify any existing rights of Swing First to receive effluent from Johnson Utilities.

Please confirm you understanding of our agreement.

Craig

Craig A. Marks

Craig A. Marks PLC

10645 N. Tatum Blvd.
Suite 200-676
Phoenix, AZ 85028
Craig.Marks@azbar.org
(480) 367-1956 Work
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(480) 367-1956 Office
(480) 304-4821 Fax
(480) 518-6857 Cell

CraigAMarksPLC.com

LinkedIn Profile

Johnson Utilities, L.L.C
968 E. Hunt Highway
Queen Creek, AZ 85242
Phone: 480-987-9870

CLASS A+ RECLAIMED WATER AGREEMENT

Application Date: January 11, 2016 Effective Date: _____

Account Number: 00120362-02	Location Name:
Name: Swing First Golf, LLC	Legal Description:
SS (if individual):	Tax Parcel No. 210-19-0670
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Applicant Signature

Exhibit E

BEFORE THE ARIZONA CORPORATION C

GARY PIERCE
Chairman
BOB STUMP
Commissioner
PAUL NEWMAN
Commissioner
SANDRA D. KENNEDY
Commissioner
BRENDA BURNS
Commissioner

IN THE MATTER OF THE APPLICATION OF JOHNSON UTILITIES, L.L.C., DBA JOHNSON UTILITIES COMPANY FOR APPROVAL OF A NEW NON-POTABLE WATER TARIFF

DOCKET NO. WS-02987A-12-0350

DECISION NO. 73521

ORDER

Open Meeting
September 19-20, 2012
Phoenix, Arizona

BY THE COMMISSION.

Introduction

1. Johnson Utilities, L.L.C., dba Johnson Utilities Company ("Company") filed an application on August 2, 2012, with the Arizona Corporation Commission ("Commission") requesting approval of a new non-potable water tariff. The new tariff will enable the Company to provide non-potable water service in limited areas within its certificated area. The general limitations are: i) the Company has an operating non-potable water well in reasonable proximity to the customer's requested point of delivery, ii) the Company has legal access to install the facilities necessary to convey non-potable water from the withdrawal well to the point of delivery, and iii) the Company has sufficient available and uncommitted capacity in the withdrawal well to deliver the requested non-potable water to the customer.

2. The proposed charges will include the monthly minimum charge based on the meter size, plus a commodity charge that will be $0.84 per thousand gallons or $273.71 per acre foot,

. . .

plus a Central Arizona Groundwater Replenishment District ("CAGRD") tax assessment per thousand gallons, and other applicable taxes and assessments.

3. The Company's current CAGRD fees are $0.84 per thousand gallons in the Phoenix Active Management Area ("AMA") and $0.21 per thousand gallons in the Pinal AMA. The Company makes an annual filing with the Commission to update the CAGRD fee. Staff estimates that the next increase adjustment (due in October 2012) should be about ten percent higher.

Background

4. The Company had been purchasing non-potable excess Central Arizona Project ("CAP") water and offering it for sale under its current Non-Potable CAP Water Service Tariff. The Company has already taken its entire excess non-potable CAP water allotment for the year and the CAP has advised the Company that it will no longer offer excess CAP water for sale after December 31, 2012. This current tariff commodity rate is $0.84 per thousand gallons, but there is no CAGRD fee chargeable as the water is not drawn from wells.

5. The Company has only one customer currently taking service under the non-potable CAP water service tariff. It is a non-profit homeowners' association located in the Phoenix AMA. The Company is proposing this new tariff to accommodate this customer. Based on the aforementioned rates, the customer will pay about double to receive the non-potable well water instead of non-potable CAP water.

Revenue and Cost

6. The Company believes that by setting the new tariff rate at the same level as the current non-potable CAP water rate, it will make the new tariff revenue neutral. Staff does not agree. In response to a Staff data request, the Company stated that it expects that one other customer will be interested in the new tariff service but states that current consumption will not go up and will go down over time as effluent becomes available. Staff believes the new tariff could possibly affect revenues but the following cost analysis (and Staff's recommendations) should limit any material change to revenues.

7. In response to a Staff data request, the Company estimated its costs to supply non-potable CAP water totaled approximately $0.83 per thousand gallons which left the Company only

a slight profit. Further, the Company estimated that its costs to supply non-potable well water will total approximately $1.00 per thousand gallons. Staff did verify that the estimated costs appeared to be reasonable. This means that the Company intends to sell non-potable water at a loss.

8. Staff believes that since the Company will take a loss on providing this particular service, that it be limited to the one current customer taking non-potable water and the one other customer (an 18-hole golf course which currently receives treated effluent from the Company's San Tan wastewater treatment plant) which the Company expects may be interested in the new service. Staff recommends that no other customer be allowed this tariffed service without first being specifically approved by the Commission.

9. Staff also recommends that the Company obtain the Commission's approval to provide any other customer non-potable water service 60 days prior to commencing that service.

10. These restrictions could be lifted after the Company's next full rate case where the actual costs can be considered along with the appropriate rate adjustments.

CONCLUSIONS OF LAW

1. The Company is a public water service corporation within the meaning of Article XV of the Arizona Constitution and A.R.S. § 40-250.

2. The Commission has jurisdiction over the Company and of the subject matter of the application.

3. Approval of a new non-potable water tariff is consistent with the Commission's authority under the Arizona Constitution, Arizona statutes, and applicable case law.

4. It is in the public interest to approve the Company's request for a new non-potable water tariff as discussed herein.

ORDER

IT IS THEREFORE ORDERED that the application by Johnson Utilities Company for approval of a new non-potable water tariff is approved as discussed herein.

IT IS FURTHER ORDERED that Johnson Utilities Company shall file a new non-potable water tariff showing a monthly minimum charge based on meter size and a commodity charge of $0.84 per thousand gallons plus other applicable taxes and fees effective October 1, 2012.

IT IS FURTHER ORDERED that this tariff applies only to the one current non-potable water customer being served by Johnson Utilities Company and the 18-hole golf course which the Company expects may be interested in the new service.

IT IS FURTHER ORDERED that, Johnson Utilities Company obtain the Commission's approval to provide any other customer non-potable water service 60 days prior to commencing that service.

IT IS FURTHER ORDERED that, Johnson Utilities Company notify its one current non-potable water customer of this tariff approved herein by October 1, 2012.

IT IS FURTHER ORDERED that this Decision shall become effective immediately.

BY THE ORDER OF THE ARIZONA CORPORATION COMMISSION

CHAIRMAN COMMISSIONER

COMMISSIONER COMMISSIONER COMMISSIONER

IN WITNESS WHEREOF, I, ERNEST G. JOHNSON, Executive Director of the Arizona Corporation Commission, have hereunto, set my hand and caused the official seal of this Commission to be affixed at the Capitol, in the City of Phoenix, this 4th day of October, 2012.

ERNEST G. JOHNSON
EXECUTIVE DIRECTOR

DISSENT: _____

DISSENT: _____

SMO:DWC:sms\RRM

SERVICE LIST FOR: Johnson Utilities Company
DOCKET NO. WS-02987A-12-0350

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Mr. Steven M. Olea
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Arizona Corporation Commission
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